Supreme Court, U.S.
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No. ---

IN THE

Supreme Court of the United States

RONALD L. BROWN,

Petitioner,

v.

WHEAT FIRST SECURITIES, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the D.C. Circuit erred in its holding that *Commonwealth Coatings* does not require vacatur of an arbitration decision where one of the arbitrators violated her duty to disclose a relationship to one of the parties before the period for peremptory strikes expired.

2. Whether the United States Court of Appeals for the D.C. Circuit erred in holding that Mr. Brown had to show that the arbitrator could be removed *for cause* in order to have the arbitration decision vacated.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Ronald L. Brown respectfully petitions this Court to exercise its *certiorari* jurisdiction to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") is reported at 257 F.3d 821 (D.C. Cir. July 31, 2001) and is reprinted in the appendix hereto. The decision of the District Court of the District of Columbia is reported at 101 F. Supp. 2d 1 (D. D.C. 2000) and is reprinted in the appendix hereto.

JURISDICTION

This is an appeal from a final order of the United States Court of Appeal for the District of Columbia Circuit, issued on July 31, 2001, which disposed of all parties' claims. The United States Supreme Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

The District Court had federal question jurisdiction over the matters decided below pursuant to 28 U.S.C. § 1331, subject matter jurisdiction over Appellant's civil rights claims pursuant to 28 U.S.C. § 1343 (a)(4), and supplemental jurisdiction over Appellant's claims not arising from a federal question pursuant to 28 U.S.C. §1367. The District Court also had jurisdiction over Appellant's claims under Federal Arbitration Act, codified at 9 U.S.C. § 1, *et. seq.*, pursuant to 9 U.S.C. §§ 10 and 11. The Court of Appeals had jurisdiction to review the District Court's determinations under the Federal Arbitration Act pursuant to 9 U.S.C. § 19 and has jurisdiction

to review the District Court's final order pursuant to 28 U.S.C. § 1291. Pursuant to the Supreme Court Rule 13, this petition was filed timely, within the 90 days after entry of the judgment.

STATUTES AND REGULATORY PROVISIONS INVOLVED

The following statutes and regulations are involved in this case:

> "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration: (b) where there was evident partiality or corruption in the arbitrators, or either of them."

9 U.S.C. § 10(b)

STATEMENT OF THE CASE

This case arises under the Federal Arbitration Act (FAA), and presents significant issues regarding the erosion of the minimum procedural safeguards for arbitration. Specifically, this case raises the question of whether allowing the non-disclosure of an arbitrator's potential bias before the expiration of the period for peremptory strikes is sufficient basis for vacation of an arbitration decision.

The United States Courts of Appeal are in disagreement about the legal test that *Commonwealth Coatings* mandates for determining whether an arbitration decision should be vacated on the basis of arbitrator bias. The FAA states that an arbitration award may be vacated "where there was evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(b). The conflicts and uncertainties among the

Courts of Appeal concerns which legal test for "evident partiality" they should adopt in determining if an arbitrator's non-disclosure is sufficient for vacating an arbitration decision.

This case raises an issue of fundamental importance and fairness as to the implications of an arbitrator's failure to disclosure a potential bias during the time permitted for peremptory strikes where the procedural rules governing the arbitration do not permit an extension of the peremptory strike period. Given the vital role arbitrators play in the administration of the Federal Arbitration Act ("FAA"), and the importance of avoiding even the appearance of impropriety in cases heard under the FAA, *certiorari* is clearly warranted in this case.

Moreover, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Circuit City Stores, Inc. v. Saint Clair Adams*, 121 S. Ct. 1302, 1313 (2001), this Court determined that employers may condition employment on mandatory arbitration provisions, which require employees to arbitrate grievances based on pre-employment contracts. In the wake of these landmark decisions, it is exceedingly important to ensure that the arbitration process adheres to certain important procedural safeguards.

Therefore, this Court should grant *certiorari* in this case and decide whether *Commonwealth Coatings* mandates the vacatur of an arbitration award where an arbitrator fails to disclose a potential bias during the period of time in which a party could have exercised a peremptory strike, removing the potentially biased arbitrator.

In this case, the arbitrator improperly failed to make a timely disclosure of her conflicts of interest. App. 9-10. This failure directly resulted in petitioner Ronald Brown's waiver of his right to exercise his one peremptory strike. Specifically, the arbitrator disclosed her conflict of interest *after* the time period for exercising such strikes had passed, thus preventing

Mr. Brown from exercising that right after he learned of the conflict.

Instead of being able to strike the arbitrator, Mr. Brown had to demonstrate that the arbitrator's actual "bias" was "direct" and definite" and that the bias was "capable of reasonable demonstration." This standard was in direct conflict with the standard set forth by this Court in *Commonwealth Coatings*.

I. Procedural Posture

On June 30, 1999, Mr. Ronald L. Brown filed his Complaint in the instant case in the United States District Court for the District of Columbia. App. 17. This case concerned, *inter alia*, a federal claim under the Civil Rights Act of 1871, 17 Stat. 13 (1871), for retaliation against a whistleblower and a claim under the public policy to the employment at-will doctrine under District of Columbia common law. The Complaint was amended on December 13, 1999. App. 17.

On February 28, 2000, Mr. Brown moved for the District Court to vacate an arbitration award previously issued in an arbitration proceeding which also concerned his public policy wrongful discharge claim. Defendants Wheat First, First Union and Marshall Wishnack moved to dismiss Mr. Brown's Complaint on March 10, 2000. The defendants also moved to confirm the arbitration award on March 20, 2000.

On June 13, 2000, the District Court ruled on all outstanding motions, denying Mr. Brown's motion to vacate the arbitration award, granting the defendants' motion to confirm the arbitration award, granting the defendants' motion to compel arbitration. App. 12-27. Mr. Brown filed a timely Notice of Appeal on July 11, 2000, limited to the dismissal of his public policy cause of action. On July 25, 2000,defendants filed a cross appeal, appealing the court's referral of the Civil Rights Act claim to arbitration. The United States Court of

Appeals for the D.C. Circuit consolidated the two appeals on August 14, 2000. On July 31, 2001, the D.C. Circuit affirmed the District Court's order confirming the arbitration award and vacated and remanded the order compelling arbitration of the statutory claim with instructions to dismiss Mr. Brown's complaint in its entirety. App. 1-7.

II. Relevant Factual Background

Mr. Brown was employed as a registered representative by Wheat First, an investment firm, on November 18, 1991. At that time, Mr. Brown completed and submitted to Wheat First a National Association of Securities Dealers (NASD) "Uniform Application for Industry Regulation or Transfer," commonly referred to as "Form U-4". App. 14-15. This form required Mr. Brown to arbitrate any employment disputes. As alleged in his complaint, during the course of his employment, Mr. Brown became aware of a widespread pattern of illegal conduct at Wheat First and he subsequently reported these alleged illegal activities to the Securities and Exchange Commission. App. 15. Mr. Brown was terminated from Wheat First Securities soon thereafter. App. 15.

On February 17, 1998, Mr. Brown, in conformance, with his pre-employment agreement, filed a wrongful discharge claim against Wheat First with NASD arbitration. He set forth a number of causes of action, including wrongful discharge in violation of public policy. App. 15.

Thereafter, NASD named a three-member arbitration panel. Pursuant to NASD rules, each arbitrator was required to disclose any past or present financial, business, professional, or social relationships with any of the parties, the parties' counsel, or any known witness. App. 38-40. Under NASD Rule 10311, a party has five days from the date on which the arbitrators' names and disclosure forms become available to make a peremptory challenge to remove one of the arbitrators. App.

37. Wendie Wachtel, one of the arbitrators selected for the *Brown* proceeding, did not disclose any potentially conflicting relationships in her initial disclosure. *See* Arbitrator Disclosure (July 27, 1998).

However, during a prehearing conference months after the initial disclosures were filed, and after the time had expired for Mr. Brown to make a peremptory challenge as of right, Ms. Wachtel disclosed that her primary business, Wachtel & Co., held a discretionary brokerage account for a partner of Kirkpatrick & Lockhart, counsel for Wheat First. App. 9-10. Ms. Wachtel also disclosed at that time that she is the "account executive" for Wheat First counsel's discretionary account with her firm. App. 9-10. In addition to these present relationships with Wheat First's counsel, Ms. Wachtel also disclosed a past connection. Ten years earlier, "her firm had acted as investment banker for corporate issuers using that firm (or a predecessor law firm) as securities counsel." App. 9-10.

Mr. Brown's counsel made an oral challenge to her presence on the panel, and apparently understood that NASD would replace Ms. Wachtel with another panelist. *See* Letter: Michael Kohn to Lynn Fraser, attachment: Steinmeyer to Brown (Dec. 23, 1998). App. 49-50. Shortly thereafter, on December 15, 1998, NASD issued a new Case Information Sheet, which indicated that Ms. Wachtel had not, in fact, been replaced. *See* Case Information Sheet (Dec. 15, 1998). Mr. Brown's counsel immediately wrote to the NASD on December 23, 1998, to object to Ms. Wachtel's continued presence on the panel. *See* Letter: Michael Kohn to Lynn Fraser, *supra*. App. 49-50. NASD responded on December 28, 1998, and informed Mr. Brown that Ms. Wachtel would not be dismissed from the panel. Instead, the letter indicated that the NASD staff attorney had spoken with Ms. Wachtel and that Ms. Wachtel did not believe cause existed for her disqualification. *See* Letter: Lynn Fraser to Michael Kohn (Dec. 28, 1998). App. 57. Instead of ordering the arbitrator removed due to her failure to timely

disclose her conflicts of interest, as required under NASD rules, NASD permitted the arbitrator to remain on the panel, and informed Mr. Brown that any effort to remove this arbitrator would have to be based on the very high for cause evidentiary standard. NASD informed Mr. Brown that he would have to prove that the arbitrator's actual "bias" was "capable of reasonable demonstration" and that the "bias must be direct" and "definite." App. 57. Mr. Brown did not have evidence of actual bias that could reach this high standard.

On September 13, 1999, NASD arbitration convened a three-member panel in which Mr. Brown's counsel again requested the disqualification of Ms. Wachtel. Ms. Wachtel declined to disqualify herself . On November 9, 1999, the arbitrators issued a ruling and dismissed all of Mr. Brown's claims. App. 28-35.

Under the NASD rules, applicable at the time Mr. Brown's arbitration was pending, a party to an arbitration could not obtain an extension of the period for peremptory challenges. App. 36-41 Moreover, even if NASD learned of the failure of an arbitration to make a disclosure in the initial disclosure form, NASD itself was without authority to correct the problem. The only available method for disqualifying an arbitrator who fails to make the mandatory bias disclosures, was a challenge *for cause*. App. 36-41.

Significantly, after Mr. Brown's case was dismissed by the arbitration panel, NASD apparently recognized the deficiencies of its arbitration rules and sought to bring them into compliance with *Commonwealth Coatings*. It amended those rules to highlight the importance of the disclosure requirements and to cited to *Commonwealth Coatings* as the basis for the necessary changes. The old NASD rules did not allow for removal of an arbitrator with a subsequently discovered conflict of interest. On the contrary, the new rules permit the Director or the President of NASD Dispute Resolution to remove an arbitrator at any juncture, based on

information not known to the parties at the time of the arbitrator's appointment *and that should have been disclosed by the arbitrator pursuant to Rule 10312.* App. 39. Significantly, under the new rules, NASD would have applied the *Commonwealth Coatings* standards to Ms. Wachtel, and she would have been disqualified from participating as an arbitrator because she failed to timely make the necessary disclosures.

In extending the authority of the Director to dismiss an arbitrator, the Commission noted that the new rules would more effectively protect parties' interests. App. 49-56. Also, NASD justified its rule change on the grounds that it will be more efficient, and will "increase confidence in the neutrality and objectivity of the arbitration process." App. 49-56. Most importantly, the Commission noted that its rule change should create an incentive for arbitrators to be more forthcoming in their disclosures.[1/] App. 49-56.

In addition, the new NASD Rules provide for potential permanent debarment of an arbitrator who fails to make all the necessary disclosures under the rules. App. 45-48. Hence, the

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[1/]It is important to note that the NASD rule-changes do not eliminate the necessity for this Court's review of the issue. The D.C. Circuit's precedent setting decision in Mr. Brown's case impacts the procedural rules governing all arbitration, not just arbitration under NASD. In addition, the NASD rules still do not settle the split in the circuits regarding the appropriate standard for overturning of arbitration award in the context of an arbitrator's failure to disclose a potential bias. Additionally, although the NASD rules now create procedures which would allow an individual to challenge an arbitration who fails to make the mandatory disclosures, because the D.C. Circuit's precedent setting decision, NASD would have the discretion not to strike such an arbitrator.

new NASD rules create procedures, which would permit NASD to comply with *Commonwealth Coatings*.

REASONS FOR GRANTING THE PETITION

This Court should exercise its *certiorari* jurisdiction to review the decision below and conclusively answer the following important question: whether the holding in *Commonwealth Coatings* mandates vacatur of an arbitration award where one of the arbitrators fails to disclose her relationship to one of the parties before the period for peremptory strikes has expired.

In 1968, this Court decided the case of *Commonwealth Coatings*, 393 U.S. 145, 149 (1968), which established certain guidelines for ensuring the neutrality of the arbitration panel in an arbitration proceeding. Justice Black made clear that "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review."

The D.C. Circuit declined to apply *Commonwealth Coatings* to Mr. Brown's case despite the fact that both cases concern the implications of an arbitrator's failure to disclose a relationship, thereby prejudicing the very heart of an arbitration process. App. 9-10. Because Mr. Brown did not have the critical information of a potential bias and conflict of interest, he was prevented from meaningfully exercising his right to a peremptory strike of Ms. Wachtel. Consequently, his arbitration decision was severely prejudiced by Ms. Wachtel's non-disclosure. Worse, the entire arbitration proceeding was tainted with an appearance of impropriety and unfairness. It was inherently prejudicial to permit an arbitrator to sit in judgement of a party's case, when that arbitrator had failed to comply with disclosure rules, had failed to timely inform that party that she had a conflict of interest and had engaged in

conduct which resulted in Mr. Brown's waiver of his right to meaningfully exercise a peremptory challenge which could have avoided the entire controversy.

In addition, this Court should grant *certiorari* because of the conflicts among the Courts of Appeal regarding *Commonwealth Coatings*. Under the Federal Arbitration Act, 9 U.S.C. § 10(c), an arbitration award may be vacated "where there was evident partiality or corruption in the arbitrators, or either of them." *Commonwealth Coatings,* which was interpreting the FAA, was decided by a plurality. The plurality decision prescribes "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." 393 U.S. at 149. In addition, the plurality states that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Id.* at 150. On the other hand, the concurring opinion by Justices White and Marshall states: "where an arbitrator has a substantial interest in a firm, which has done more than trivial business with a party, the fact must be disclosed." *Id.* at 151-52. Because one of the concurring justices was necessary to constitute a majority and the two opinions are contradictory, the Courts of Appeal have struggled to extract the proper legal standard for evident partiality, from *Commonwealth Coatings*. *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 698 (2nd Cir. 1978) ("the two texts cannot be entirely reconciled").

The D.C. Circuit's decision in Mr. Brown's case marks a considerable departure from both *Commonwealth Coatings* and the prior decisions of other circuits and exacerbates the circuit split. In rejecting Mr. Brown's position on the grounds that he does not meet the *for cause* standard, the D.C. Circuit ignores the legal standard in *Commonwealth Coatings* and set forth a standard at odds with all other circuits of appeal. Although the United States Courts of Appeal have adopted different standards for vacatur of an arbitration decision in the

context of a non-disclosure, they all set the bar lower than *for cause* for vacatur of an arbitration decision in the context of non-disclosure.

For these reasons, as set forth below, Petitioner respectfully requests that this Court grant this petition and review the D.C. Circuit's decision in this matter.

I. The Decision Below Raises An Exceedingly Important Question of Law.

Recognizing the broad scope of the FAA, in March 2001, this Court stated: "the Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Circuit City Stores, Inc. v. Saint Clair Adams*, 121 S. Ct. 1302, 1313 (2001). Given the tremendous impact of the FAA on the ability of persons to protect their statutory or common law rights, it is imperative that rules promulgated to ensure the fairness of arbitration procedures are preserved. Ensuring that arbitration proceedings are not clouded by undisclosed conflicts of interest and the failure or arbitration-judges to comply with disclosure rules, is absolutely necessary in ensuring public confidence in FAA-mandated proceedings.

Consistent with *Commonwealth Coatings*, the NASD rules prescribe that "Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination." NASD Rule 10312. On the basis of these disclosures, the parties are allowed a certain number of peremptory strikes. Both the right to exercise a peremptory strike and the duty of arbitrators to disclose are rendered meaningless if the D.C. Circuit's holding is upheld.

Ms. Wachtel disclosed that she had a discretionary brokerage account for a partner of Kirkpatrick & Lockhart, counsel for Wheat First, only *after* the period for peremptory strikes had expired. App. 9-10. Mr. Brown made the Director of Arbitration aware of his concern immediately both orally and via letter because there was no provision in the rules for him to make a late-filed peremptory strike. App. 10. Despite Mr. Brown's expressed concerns and specific request that Ms. Wachtel be removed, the D.C. Circuit ignored Ms. Wachtel's misconduct and its impact on the proceeding. The D.C. Circuit based its decision on flawed reasoning and on an irrelevant factual distinction.

First, the court states that *Commonwealth Coatings* is inapplicable, despite Mr. Brown having been deprived of his right to a peremptory strike, because Ms. Wachtel's non-disclosure was revealed pre-judgment rather post-judgment. App. 10. This assertion constitutes a distinction without meaning. *Commonwealth Coatings* mandates that an arbitration decision that is tainted by the non-disclosure of a potential bias be vacated. Whether the fact that the panel is tainted becomes known before or after judgment is irrelevant.[2/]

In *Kiernan v. Piper Jaffray Companies, Inc.*, 137 F.3d 588, 592 (8th Cir. 1998), an arbitrator's non-disclosure was revealed prejudgment and the petitioners contended that the arbitration decision therefore deserved to be vacated. The Eighth Circuit refused to vacate the award because they did not

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[2/]Obviously, a party should be required to file a timely *Commonwealth Coatings* objection to an arbitrator. Thus, it would have been wrong from Mr. Brown to delay until post-judgment proceedings to file his objection to the arbitrator. In this case, Mr. Brown filed a timely objection to the arbitrator, and provided NASD with ample time to replace the arbitrator without unduly delaying the proceeding.

"seek Powers' [the biased arbitrator] removal" and because they failed to object to Powers' presence on the panel at the time. On the contrary, Mr. Brown did object to Ms. Wachtel's presence and did seek her removal from the panel.[3/]

Second, the D.C. Circuit maintains that Mr. Brown's position is unavailing because he did not use his peremptory strike against anyone else. App. 10. However, it is precisely because he did not have the necessary information for exercising his peremptory strikes, that he did not exercise it. That Mr. Brown did not think any of the other arbitrators were biased enough to warrant a peremptory strike does not mean that he would not have used it against Ms. Wachtel had her bias been disclosed. On the contrary, upon learning of the Ms. Wachtel's bias, he did attempt to have her disqualified. Moreover, he attempted to have her disqualified prior to Ms. Wachtel rendering a decision on the merits. Thus, Mr. Brown's concern over Ms. Wachtel was based solely on her bias and conflict of interest, it was not an attempt to creatively use procedural rules merely to raise an untimely peremptory strike after he learned that the arbitrator was going to rule against him on the merits.

The D.C. Circuit also claimed that Mr. Brown should have to meet the *for cause* standard in order to have the arbitration decision vacated. App. 10. This constitutes a radical departure from *Commonwealth Coatings*, and all the other circuits. This Court held in *Commonwealth Coatings* that an arbitration decision should be vacated where an arbitrator fails to disclose "any dealings that might create an impression of possible bias." 393 U.S. at 149. In so holding, this Court rejected the idea that a party must show actual bias on the part

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[3/]The Eighth Circuit requirement that a party make timely objection to a tainted arbitrator who failed to make appropriate disclosures is reasonable and logical.

of the party that failed to disclose a relationship to one of the parties.[4] If the standard were *for cause*, then Mr. Brown would have to show actual bias, but this Court has held that in the case of a non-disclosure the bar is lower than actual bias. Although the lower courts may be in disagreement about the precise legal standard, we are unable to find one federal appellate case where the court has applied a *for cause* standard for vacatur of an arbitral decision in the context of an arbitrator's non-disclosure.[5]

The failure to repudiate an arbitrator's non-disclosure undermines critical procedural safeguards that exist in arbitration proceedings. In deciding Mr. Brown's case, the D.C. Circuit has eroded the rights that parties to arbitration are given by the NASD rules and in *Commonwealth Coatings* that try to ensure that individuals who submit to arbitration can be confident that their substantive rights will not be undermined through technical pitfalls.

However, the D.C. Circuit's decision actually undermines NASD's new rules and could ultimately lead to

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[4]The lower court also faulted Mr. Brown for failing to file an "extension of time" to use his "peremptory strike." App. 10. However, no such procedure existed under the then-current NASD rules. In fact, it was the absence of any such procedure which led, in part, to NASD's amending its rules. App. 36-41.

[5]There are actually two circuit splits that can be resolved. First, the D.C. Circuit has put itself in opposition to the other circuits by articulating a *for cause* standard in the context of non-disclosure. Even if that is rejected as conflicting with *Commonwealth Coatings*, there is still a conflict among the circuits about which legal standard is the appropriate one to extract from *Commonwealth Coatings*.

NASD improperly refusing to disqualify an arbitrator who fails to disclose a potential bias.

The D.C. Circuit's opinion has broad implications which could undermine public confidence in arbitration proceedings. The lower court's rule applies to arbitration proceedings which are not governed by the new NASD rules. Thus, in non-NASD arbitration proceedings, the D.C. Circuit's opinion permits arbitrators to withhold information regarding a conflict of interest at the time arbitrators make initial background disclosures to the parties. The arbitrator could then wait until the peremptory strike period has expired, but before final judgement, and make the necessary disclosures. Thus, the lower court's ruling not only undermines and conflicts with *Commonwealth Coatings*, it permits and implicitly authorizes arbitrators to engage in this improper practice.

II. This Court should grant *certiorari* to resolve conflicts and ambiguities in the decisions of the United States Courts of Appeal.

The conflicting rulings of the United States Courts of Appeals, regarding *Commonwealth Coatings*, should be clarified. Because *Commonwealth Coatings* was decided by a plurality, many courts have noted the difficulty of extracting the correct legal test from *Commonwealth Coatings*, and needless to say, the various courts have interpreted that landmark case differently as a result. *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 699 (2nd Cir. 1978), ("The diverse views expressed in these opinions pose difficulties in applying the teachings of *Commonwealth Coatings*"); *Morelite Construction Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 82 (2nd Cir. 1984) (we are left in the dark as to whether an 'appearance of bias' will suffice to meet the seemingly more stringent 'evident partiality'

standard."); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983) (The only Supreme Court decision provides little guidance because of the inability of a majority of Justices to agree on anything but the result"). This Court should resolve the conflicting decisions of the United States Courts of Appeal. The D.C. Circuit, in a radical departure from *Commonwealth Coatings* and other circuits, held that Mr. Brown had to meet the traditional *for cause* standard to get the decision vacated. App. 10 (Brown failed to allege "that the connections disclosed would justify removal for cause"). The Court should grant *certiorari* in order to make it perfectly clear that in the context of a failure to disclose a potential bias, the parties need not demonstrate the traditional *for cause* standard to have an arbitration award vacated.

Some of the courts of appeal adopt the rule that appears close to the majority opinion in *Commonwealth Coatings*: an arbitrator should disclose "any dealings that might create an impression of possible bias." *Lifecare Int'l Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433-34 (11th Cir.1995). On the other hand, other courts have adopted rules closer to the concurrence in *Commonwealth Coatings*. For example, "an arbitrator's failure to disclose non-trivial relationships with parties is grounds for vacating an arbitration award regardless of any actual bias, prejudice, or unfairness. *Ormsbee Dev. Co. v. Santa Fe Pacific Railroad*, 668 F.2d 1140, 1144 (10th Cir. 1982). Either of these standards is lower than the *for cause* standard articulated by the D.C. Circuit and the NASD arbitration panel. Regardless, this Court should resolve the split created by D.C. Circuit with all other circuits and resolve the ongoing split in the circuits over which legal test should be applied for vacatur of an arbitration decision in the context of a non-disclosure.

The Courts of Appeals have recognized the conflict that *Commonwealth Coatings* has generated among the circuits. The Eleventh Circuit when confronted with a non-disclosure case, rejected a precedent set by another circuit that one of the

parties had presented to bolster their argument. The court stated that "instead of following *Schmitz* [a Ninth Circuit case] the district court should have applied the law of our Circuit, which is that an arbitration award may be vacated due to the "evident partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli Money Purchase Plan and Trust v. ADM Investor Services, Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998).

In addition, the Eighth Circuit summed up the conflict among the circuits when that court stated:

> The absence of a consensus on the meaning of "evident partiality" is evidenced by the approaches adopted by the different circuits. *See e.g. ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 500 (4th Cir. 1999) (to establish evident partiality, the party seeking vacatur under 9 U.S.C. 10(a)(2) has the burden to demonstrate "that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration"); *Gianelli*, 146 F.3d at 1312, (evident partiality requires that an actual conflict exist or the "arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists"); *Morelite Constr. Corp. v. New York City Dist. Council*, 748 F.2d 79, 84 (2nd Cir. 1984) (requiring more than an "appearance of bias" and holding that a "reasonable person would have to conclude that an arbitrator was partial to one party of the arbitration").

Montez v. Prudential Securities, Inc., No. 00-3957, 2001 U.S. App. LEXIS 17024 at *8 (July 31, 2001).

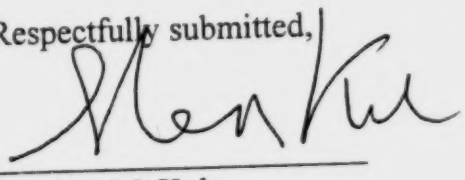
Finally, in a case strikingly similar to Mr. Brown's case, the arbitrator failed to disclose a relationship to one of the parties which prevented one of the parties from using a peremptory challenge against this arbitrator. *Olson v. Merrill Lynch, Pierce, Fenner, & Smith*, 51 F.3d 157, 159 (8th Cir. 1995). The court noted, in reference to *Commonwealth Coatings*, "because the concurring opinion presents an arguably narrower standard and the votes of concurring Justices White and Marshall were needed to create a majority, there is some uncertainty among the courts of appeals about the holding in *Commonwealth Coatings*." *Id.* at 159. Deciding that it was unnecessary to resolve this tension, the court went on to hold, "we conclude Hentges was required to disclose the business relationship between M & S and Merrill Lynch under both the majority opinion and the concurrence in *Commonwealth Coatings*." *Id.* at 159.

This Court should grant *certiorari* and resolve the conflicts among the courts of appeals about the standard for determining vacatur of an arbitration award where an arbitrator violates his duty to disclose a potential bias.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Ronald L. Brown's for *Certiorari*.

Respectfully submitted,



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October 5, 2001

RONALD L. BROWN, APPELLANT/CROSS-APPELLEE v. WHEAT FIRST SECURITIES, INC., ET AL., APPELLEES/CROSS-APPELLANTS

No. 00-7171,
Consolidated with 00-7173

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

2001 U.S. App. LEXIS 17074

April 13, 2001, Argued

July 31, 2001, Decided

PRIOR HISTORY:
[*1] Appeals from the United States District Court for the District of Columbia. (No. 99cv01776).

DISPOSITION:
Order confirming the arbitration award affirmed and the order compelling arbitration of the statutory claim vacated and remanded with instructions to dismiss the complaint.

COUNSEL:
Stephen M. Kohn argued the cause for appellant/cross-appellee. With him on the briefs were Michael D. Kohn and David K. Colapinto.

Paul Gonson argued the cause for appellees/cross-appellants. With him on the briefs were Stephen G. Topetzes and Rebecca L. Kline. Teri L. Nelson entered an appearance.

JUDGES:
Before: WILLIAMS, GINSBURG and ROGERS, Circuit Judges. Opinion for the Court filed by Circuit Judge WILLIAMS.

OPINIONBY:
WILLIAMS

OPINION:

WILLIAMS, *Circuit Judge*: In *Cole v. Burns International Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465 (D.C. Cir. 1997)*, we held that an employee who agrees to arbitration of disputes as a condition of employment and who makes a claim based on federal statutory rights may not be charged certain fees and expenses for arbitration of the claim, at least where that condition of employment was demanded by an employer not subject to regulatory oversight. See [*2] *LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702, 704 (D.C. Cir. 2001)*. This case raises the issue whether *Cole* embraces or should be extended to non-statutory state law claims that are grounded in a "public policy rationale." We hold that the logic of *Cole* does not reach so far.

* * *

Appellant Ronald Brown was employed by the Washington, D.C. office of Wheat First Securities, a member of the National Association of Securities Dealers ("NASD"), from November 1991 until his termination with three days' notice in February 1997. When Brown signed on with Wheat First, he executed the NASD "Uniform Application for Securities Industry Registration or Transfer," commonly known as Form U-4, which includes a mandatory arbitration clause.

In February 1998 Brown filed a claim under his arbitration agreement seeking $ 25,000,000 in damages for alleged wrongful termination, breach of implied contract, defamation, slander and tortious interference. In support of his wrongful termination claim, he argued that the District of Columbia courts have created a "whistleblower" exception to its employment-at-will rule, and that Wheat First had fired him for alerting the [*3] Securities and Exchange Commission to what he perceived to be illegal activities occurring at Wheat First. He paid a $ 500 non-refundable filing fee and a $ 1,500 hearing deposit. He also signed a Uniform Submission Agreement, agreeing to the arbitration of his claims under the NASD's rules. On February 11, 1999 during a pre-trial conference, the parties jointly requested a postponement of the final hearing, then scheduled for March 1999. The panel imposed an "adjournment fee" of $ 1,500 and assessed each party $ 750.

The final hearing was later rescheduled for September 13, 1999. But in April 1999 Brown filed an objection to the fee assessment, arguing that because he was pursuing "public law" claims, *Cole* prohibited any assignment of arbitration fees to him. The NASD rejected this theory. On June 29 and 30, 1999, respectively, Brown filed a second objection with the NASD and filed his claims in district court, for the first time alleging a violation of the Civil Rights Act of 1871 in addition to the claims previously brought to arbitration.

On September 7 the NASD denied Brown's second motion. "Not willing to participate" in the arbitral proceedings, Brown sought on September [*4] 10 to cancel the agreement to arbitrate contained in Form U-4 and on September 12 to have the arbitrators dismiss the claim without prejudice. On September 13 his attorney appeared before the arbitration panel to preserve objections, but didn't otherwise participate. On

November 9, 1999 the arbitration panel dismissed his claims with prejudice and assessed him a fee of $ 6,365, which included costs that under *Cole* are considered arbitrators' fees. See *Cole, 105 F.3d at 1484 n.15* (defining such fees).

Brown then filed a motion in the district court proceeding to vacate the arbitration award; Wheat First responded with a motion to confirm the award. The district court granted the motion to confirm and denied Brown's motion to vacate, concluding that *Cole* applies only to statutory claims. *Brown v. Wheat First Securities, Inc., 101 F. Supp. 2d 1, 2-5 (D.D.C. 2000).* On the basis of a Wheat First motion filed prior to the arbitrators' dismissal of Brown's claims, the district court also ordered arbitration of the newly-raised Civil Rights Act claims, but required that they be arbitrated on terms consistent with *Cole. Brown, 101 F. Supp. 2d at 7.* [*5] Brown appeals the district court's confirmation of the arbitrators' dismissal and the denial of his motion to vacate. *Id. at 5-7.* Wheat First cross appeals the compelled arbitration, arguing that once the arbitration award was confirmed, the Civil Rights Act claims were precluded.

* * *

Brown's principal claim of error rests on the assertion that *Cole* applies to his truncated arbitration with Wheat First, either by its own terms or because its logic must extend to state common law claims that are rooted in "public policy." We assume in Brown's favor that the Supreme Court's recent decision in *Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000),* finding that a party claiming that arbitration would be "prohibitively expensive" must at least show "the likelihood of incurring such costs," *121 S. Ct. at 522,* leaves *Cole* fully intact. We also assume in his favor that his whistleblower claim would qualify as an exception to the employment-at-will doctrine under the

principles of District of Columbia Law elucidated in *Carl v. Children's Hospital, 702 A.2d 159 (D.C. 1997).* Nonetheless, both Brown's [*6] arguments fail.

Cole involved claims of discrimination under Title VII of the Civil Rights Act of 1964. Acknowledging that the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991),* had "made clear that, as a general rule, statutory claims are fully subject to binding arbitration," *Cole, 105 F.3d at 1478* (quoting *Gilmer, 500* U.S. at 26), we also noted that "*Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes," *id.* at 1482. The arbitration agreement will be valid "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *Id.* at 1481 (quoting *Gilmer, 500* U.S. at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)))* (alteration in original). As to fees, we found that "it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial [*7] forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court." *Cole, 105 F.3d at 1484.* Accordingly we interpreted the arbitration agreement as requiring the employer to pay the arbitrator's fees. See *id.* at 1485.

In arguing that *Cole*'s holding extends to his non-statutory claims, Brown relies exclusively on the fact that *Cole* on occasion appears to use the phrases "public law" and "public rights" interchangeably with "statutory law" and "statutory rights." He contends that "public" carries a broader meaning than "statutory" and that this broader meaning should be given

to the holding of the case. We think that Brown reads too much into this potentially expansive language.

None of these terms has a sharply defined meaning. At oral argument, for example, Brown offered a definition of "public right" that he attributed (without specific citation) to Black's Law Dictionary: "Enforcement of rights in cases where the state is regarded as the subject of the right or the object of the duty." The 7th edition offers a narrower concept: "A right belonging to all citizens and usu. vested in and [*8] exercised by a public office or political entity." Black's Law Dictionary 1324 (7th ed. 1999). For public law, Black's says: "The body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself; constitutional law, criminal law, and administrative law taken together." *Id.* at 1244 (7th ed. 1999). While totally different, both of these published definitions have in common the feature that they seem not to include the District of Columbia's whistleblowing doctrine.

Even more to the point, our opinion in *Cole* is limited at vital points to statutory rights. For instance, when discussing the protections that *Gilmer* suggests are necessary, the opinion refers only to the non-waivability of the substantive protections of statutory rights and of access to a neutral forum in which to enforce them. See *Cole, 105 F.3d at 1482.* It nowhere mentions the waivability of or access to a forum to enforce non-statutory "public law." The court framed the issue as:

Can an employer condition employment on acceptance of an arbitration agreement that requires the employee to submit his or [*9] her *statutory* claims to arbitration and then requires that employee to pay all or part of the arbitrator's fees?

Id. at 1483 (emphasis added).

Further, in *Gilmer* the Supreme Court determined that compulsory arbitration pursuant to an employment agreement is not inconsistent with the Age Discrimination in Emplōyment Act, the federal statute in question there. *Gilmer, 500* U.S. at 26-33. In *Cole* we defined our task as resolving an "issue not raised by the agreement in *Gilmer*," *105 F.3d at 1483*, namely the fees issue. It would be quite a contortion of *Cole* to find that it had addressed a far broader subject than the case that it set out simply to refine. See also *LaPrade, 246 F.3d at 708* (assuming that arbitration assessment of fees for arbitration of non-statutory claims would not be subject to *Cole*).

We also see no basis for extending *Cole*. As we have explained, our central rationale--respecting congressional intent--does not extend beyond the statutory context. Moreover, by enacting the Federal Arbitration Act, Congress "manifested a 'liberal federal policy favoring arbitration agreements.' " *Gilmer, 500* [*10] U.S. at 25 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983))*. The Act also pre-empted state restrictions on the enforcement of arbitration agreements. See *Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 272, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995); Southland Corp. v. Keating, 465 U.S. 1, 10-16, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984). Gilmer*, as we've seen, framed the question as whether dispute resolution under the FAA was consistent with the federal right-creating statute in question. See also, e.g., *Green Tree, 121 S. Ct. at 521* ("We first ask whether the parties agreed to submit their claims to arbitration, and then ask whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.") (internal citations omitted). For a common law claim under District of Columbia law, any such inconsistency would be resolved in favor of the only federal law involved, the FAA.

Brown repeatedly urges that the D.C. Court of Appeals explicitly grounded its whistleblower exception in a "public [*11] policy" rationale. If this criterion controls, it is hard to see what falls outside it. All claims not based on contract-including, for example, the defamation and tortious interference claims that Brown asserted but does not link to his fees theory--implement values that society has in one way or another thought deserving. Even contract, although the branch of law most dependent on and deferential to individual choice, rests ultimately on social decisions to support fulfillment of promises either as a good in itself or as an instrumental good, facilitating people's investment in projects that depend on others' adherence to their promises. Further, even if the exception identified by the D.C. court were somehow special, it is inconsequential as a measure of *Congress*'s interest in the stated policy. While Congress has enacted specific whistleblower protections, Brown never here asserts that he falls within any of them.

Brown also nowhere asserts that D.C. law creates a *Cole*like requirement for its own common law "public policy" causes of action. Perhaps this omission is because state restrictions on arbitration are pre-empted by the Federal Arbitration Act. See *Allied-Bruce, 513 U.S. at 272.* [*12] Conceivably the rule Brown proposes could arise as part of the District of Columbia's law and yet escape pre-emption by being classified as a limitation on the arbitration *procedures*, rather than on the enforcement of agreements. See *Southland, 465 U.S. at 11 n.6.* Because neither party raised this issue, we need not address it.

Finally Brown asserts that because Congress in 1901 granted power to the D.C. courts to enforce the common law, see Act of March 3, 1901, 31 Stat. 1189 (1899-1901), in the District of Columbia "common law and statutory claims are on

the same footing." Obviously the District of Columbia's possession of congressionally granted authority to create common law does not turn all its doctrines into the equivalent of federal statutes, anymore than the Constitution's preservation of state lawmaking authority turns all state laws into federal constitutional law.

In short, the proposed extension of *Cole* would significantly alter the terms of the Federal Arbitration Act, imposing a serious procedural limit on a wide (but unpredictable) range of arbitration claims, all without the slightest signal from Congress.

* * *

Brown makes two secondary [*13] arguments that need not detain us long. He argues, first, that even if he loses on the *Cole* claim the arbitration ruling should be vacated because the arbitrators lost jurisdiction when--in the middle of the arbitration that he had initiated--he went to court with a challenge to the arbitrability of his claims based on *Cole*. This loses on a superfluity of grounds, the simplest of which is that Brown's was a *losing Cole* claim.

Brown also asserts that the failure of one of the arbitrators to timely disclose a tangential relationship to one of the lawyers for Wheat First requires vacatur of the arbitration award. The NASD rules require arbitrators to disclose past or present relationships with any of the parties, counsel, or witnesses. See NASD Code of Arbitration Procedure Rule 10312. A party then has ten days after the announcement of the arbitrators to make a peremptory strike against one of the arbitrators. See *id.* Rule 10311. Several months after the initial disclosures but still months before the hearing, one of the arbitrators disclosed that she was the account executive of a discretionary brokerage account for a partner of the law firm representing Wheat First [*14] in this matter, and that more

than 10 years earlier her firm had acted as investment banker for corporate issuers using that firm (or a predecessor law firm) as securities counsel.

Brown claims that this late disclosure deprived him of his right to exercise his peremptory strike. But the cases cited in support of this proposition all involved revelations made after the *award* had been made, and are therefore inapplicable here. See, e.g., *Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 21 L. Ed. 2d 301, 89 S. Ct. 337 (1968)*. Brown fails to show that he requested an extension of the time available to use his peremptory strike. Nor does he show that he used his peremptory against another arbitrator, which would at least explain a belief (which he nowhere asserts) that he had no peremptory left. His only written communication on the matter (Brown claims verbal objections that are in the record only to the extent his letter and the NASD response make reference to them) requested only removal *for cause*. The NASD rejected this request, and Brown fails to even allege here that the connections disclosed would justify removal for cause.

* * * [*15]

Wheat First argues on cross appeal that Brown's Civil Rights Act claim--which first appeared in a district court complaint filed after commencement of the arbitration--is barred by claim preclusion. Thus, it argues, the district court should not have ordered arbitration on the claim, but rather should have dismissed it. We agree.

Brown's civil rights claim, alleging a conspiracy to prevent him from reporting criminal wrongdoing, arises out of essentially the same set of events that were the subject of his original arbitral claims. It is clear that final adjudication of those claims would bar the civil rights claim, see, e.g., *Schattner v. Girard, Inc., 215 U.S. App. D.C. 334, 668 F.2d*

1366, 1368-69 (D.C. Cir. 1981), so long as Wheat First hasn't forfeited its claim preclusion objection.

The record plainly shows that it did not. Wheat First has not yet filed its answer to Brown's district court complaint. "If a party that fails to assert res judicata in a [pre-answer] motion is sleeping on its rights, it is an inconsequential catnap." *Stanton v. District of Columbia Court of Appeals, 326 U.S. App. D.C. 404, 127 F.3d 72, 77 (D.C. Cir. 1997)*. Thus [*16] there was no forfeiture.

We will assume in Brown's favor that the issue was raised for the first time on appeal. In *Stanton*, we allowed a party to raise res judicata for the first time on appeal where there was no forfeiture and the claim could be successfully raised below on remand. See *127 F.3d at 77* ("We can conceive of no reason for such judicial volleyball."). Concern for the efficient use of adjudicative resources seems even more compelling here, where in theory the defense would be shipped off to arbitration, presumably to return to district court on similar cross motions.

Brown asserts that he will be prejudiced if we find the claim preclusion defense properly before us because it will mean the dismissal of his last remaining claim. But the only prejudice that Brown will suffer is the prejudice that comes from having a losing argument.

The order confirming the arbitration award is affirmed and the order compelling arbitration of the statutory claim is vacated and remanded with instructions to dismiss the complaint.

So ordered.

RONALD L. BROWN, Plaintiff, v. WHEAT FIRST SECURITIES, INC., et al., Defendants.

Civil No. 99-CV-01776 (LFO)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

101 F. Supp. 2d 1; 2000
U.S. Dist. LEXIS 8874; 16 BNA IER CAS 804

June 13, 2000, Decided

June 13, 2000, Filed

DISPOSITION:
[**1] Plaintiff's motion to vacate arbitration award denied, defendants' cross-motion to confirm award granted, defendants' motion to compel arbitration of plaintiff's statutory claims with instructions to arbitrators with respect to the employer's responsibility for arbitrators' fees and expenses granted, and plaintiff's complaint dismissed as moot.

COUNSEL:
For RONALD L. BROWN, plaintiff: Stephen Martin Kohn, David Keith Colapinto, KOHN, KOHN & COLAPINTO, P.C., Washington, DC.

For WHEAT FIRST SECURITIES INC, FIRST UNION CORPORATION, defendants: Stephen Gregory Topetzes, Paul Gonson, KIRKPATRICK & LOCKHART, L.L.P., Washington, DC.

For FERRIS BAKER WATTS, INC., defendant: Steven Keith Davidson, STEPTOE & JOHNSON, L.L.P., Washington, DC.

For LEGG MASON WOOD WALKER, INC., defendant: Benjamin Sorrells Boyd, Bruce T. Carton, PIPER MARBURY RUDNICK & WOLFE, LLP, Washington, DC.

JUDGES:
Louis F. Oberdorfer, UNITED STATES DISTRICT JUDGE.

OPINION BY:
Louis F. Oberdorfer

OPINION:

[*1]

MEMORANDUM

Plaintiff Ronald L. Brown, a former employee of defendant Wheat First Securities, Inc., is suing Wheat First, First Union Corp., and several individuals employed by Wheat First for conspiracy in violation of Section [**2] 2 of the Civil Rights Act of 1871, 17 Stat. 13 (April 20, 1871), wrongful termination, and tortious interference with economic advantage. Compl. Three motions are pending: (1) defendants Wheat First, First Union, and Marshall Wishnack moved to compel arbitration on the authority of *9 U.S.C. § 4* (1994) ("A party aggrieved by the alleged [*2] failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court...for an order directing that such arbitration proceed in the manner provided for in such agreement"), or in the alternative, for dismissal of plaintiff's first amended complaint (Dkt. 28); (2) defendants

Wheat First and First Union moved to confirm the arbitration award pursuant to *9 U.S.C. § 9* ("If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order confirming [**3] the award unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.") (Dkt. 29); and (3) invoking *9 U.S.C. § 10*(a)(4), plaintiff moved to vacate that award ("In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration - ... (4) Where the arbitrators exceeded their powers...") (Dkt. 26). All motions have become ripe. For the reasons stated below, an accompanying order denies plaintiff's motion to vacate the arbitration award, grants defendants' cross-motion to confirm the award, grants defendants' motion to compel arbitration of plaintiff's statutory claims with instructions to the arbitrators with respect to the employer's responsibility for arbitrators' fees and expenses, and dismisses plaintiff's complaint as moot.

I.

Defendant Wheat First employed plaintiff as a registered representative in its Washington, [**4] D.C., office from November 13, 1991, until February 21, 1997. Compl. 13-14. At the time of his hiring, plaintiff completed and signed a Uniform Application for Securities Industry Registration or

Transfer (Form U-4) in order to register with the National Association of Securities Dealers (NASD). Dkt. 28, Ex. 1. In signing the Form U-4, plaintiff agreed "to arbitrate any dispute, claim or controversy that may arise" between himself and his employer, "that is required to be arbitrated" under NASD rules. Id. at p. 4, P 5.

Plaintiff alleges that, during his employment at Wheat First, he became aware of "numerous illegal activities," including, *inter alia*, unauthorized, excessive, and unsuitable trading in customer accounts, improper relationships with customers, and failure to report customer complaints to legal and regulatory authorities. Compl. 18-19. In October 1996, plaintiff reported the alleged misconduct to his manager and to Wheat First's compliance officer. Compl. 23-26. In November 1996, plaintiff communicated to the Securities and Exchange Commission details of the alleged violations of law occurring at Wheat First. Compl. 30-32.

On February 21, 1997, Wheat First terminated [**5] plaintiff's employment for "lack of production." Compl. 38. On February 17, 1998, plaintiff filed with the NASD's Office of Dispute Resolution a Statement of Claim against Wheat First that included allegations of wrongful termination (retaliation), breach of implied contract, defamation, slander, and tortious interference with business relationships. Dkt. 28, Ex. 2. Plaintiff's 1998 Statement of Claim did not allege that Wheat First had violated any federal statute. See id. At the time he filed the Statement of Claim, plaintiff signed a Uniform Submission Agreement, which submitted "the present matter in controversy, as set forth in the attached statement of claim...to arbitration in accordance with the Constitution, By-Laws, [*3] Rules, Regulations, and/or Code of Arbitration Procedure" of the NASD. Dkt. 28, Ex. 3. The Uniform

Submission Agreement also included the following provision: "The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement and further agree that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit [**6] to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment." Id. On June 29, 1998, after it filed its answer to plaintiff's Statement of Claim, defendant Wheat First also signed the Uniform Submission Agreement. Dkt. 28, Ex. 5.

The original arbitration hearing, scheduled to begin March 22, 1999, was adjourned at the request of the parties. Dkt. 14, Addendum p. 5. Rule 10319 of the NASD Code of Arbitration Procedure sets forth the procedure for adjournments. National Association of Securities Dealers Code of Arbitration (visited May 2, 2000) <http://www.nasdr.com/2820b.htm# 10319>. Rule 10205(c) states that the arbitrator determines who bears the costs for adjournments. Id. at htm # 10205. Pursuant to these rules, the arbitrators assessed $ 1,500 in fees, requiring each party to pay $ 750. Dkt. 14, Addendum p. 5.

Plaintiff filed an "Opposition to Order Directing [Plaintiff] to Pay for Costs Related to Arbitration," requesting that the arbitration panel either: (1) render a declaratory judgment ending arbitration and allowing plaintiff to pursue his case in a court of competent jurisdiction, or (2) issue an order that plaintiff was [**7] not required to pay any fees in the proceedings. Id. at p. 1. On April 12, 1999, the NASD's Office of Dispute Resolution informed plaintiff that the imposition of adjournment fees was consistent with the NASD's Code of Arbitration Procedure, and reiterated the requirement that plaintiff pay $ 750 in adjournment fees. Id. On June 29, 1999,

the day before plaintiff filed his original complaint in this matter, plaintiff moved again for the arbitrators to enter a declaratory judgment and to find that, because plaintiff had been ordered to pay part of the adjournment fees, the NASD "no longer had jurisdiction and that the plaintiff may pursue his case in a court of competent jurisdiction." Id. at p. 3. On September 7, 1999, the arbitrators, in a letter sent by the Office of Dispute Resolution, denied plaintiff's motion without discussion. Id. at p. 32. On September 13, 1999, the arbitration hearing commenced. Plaintiff did not attend the proceeding, sending his counsel, instead, solely to restate his objections to the NASD's jurisdiction over the matter. Dkt. 14, p. 6. On November 9, 1999, after hearing only defendants' version of the case, the arbitrators dismissed plaintiff's [**8] Statement of Claim with prejudice, requiring that each party bear its own costs and expenses. Dkt. 14, Addendum, p. 54-57. The arbitrators assessed Wheat First $ 9,985, and obligated plaintiff to pay $ 6,365, consisting of a $ 500 initial filing fee, a $ 750 adjournment fee, $ 5,100 in forum fees, and $ 15 for administrative costs. Id. at 57.

Meanwhile, on June 30, 1999, plaintiff had filed his original complaint in this Court. On December 13, 1999 (after the November 9, 1999, arbitration award), he filed his first amended complaint, asserting common law claims similar to those in his Statement of Claim and, for the first time, alleged a conspiracy in violation of Section 2 of the Civil Rights Act of 1871.

II.

Plaintiff now moves to vacate the November 9 arbitration award, arguing that the arbitrators "exceeded their powers" by failing to stay the arbitration proceeding until a court of

competent jurisdiction ruled on plaintiff's legal challenge to arbitrability that resulted from the arbitrators' assessment of fees on plaintiff. Dkt. 26, p. 1, 5. Defendants move to confirm the arbitration award, which dismissed with prejudice [*4] plaintiff's common law claims (wrongful termination, [**9] breach of implied contract, defamation, slander, and tortious interference). Dkt. 28, Ex. 2.

Plaintiff relies on *Cole v. Burns International Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465 (D.C. Cir. 1997)*. In that case, after being fired from his job, plaintiff filed a complaint in federal court against his employer, alleging, *inter alia*, racial discrimination in violation of *Title VII. 105 F.3d at 1469*. Defendant moved to dismiss the complaint and compel arbitration of the dispute, pointing to a "Pre-Dispute Resolution Agreement" between the parties, which authorized the defendant employer to choose to arbitrate any claims arising out of the termination of employment. Id. The district court found that the Agreement covered plaintiff's claims, granted defendant's motion to compel arbitration, and dismissed plaintiff's complaint. *Cole v. Burns Int'l Sec. Serv., 1996 U.S. Dist. LEXIS 22541*, No. 95-1785 (D.D.C. Jan. 31, 1996).

A divided court of appeals affirmed the district court subject to a proviso. *Cole, 105 F.3d at 1488*. The court interpreted the arbitration agreement as "requiring [defendant] to pay all of the arbitrator's fees necessary for a full [**10] and fair resolution of [plaintiff's] statutory claims." n1 Id. at 1485. The court ruled that plaintiff "could not be required to agree to arbitrate ***his public law claims*** as a condition of employment if the arbitration agreement required him to pay all or part of the ***arbitrator's fees and expenses***." Id. at 1485 (emphasis added). The court noted: "It would undermine Congress's intent

to prevent employees who are seeking the vindicate ***statutory*** rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court." Id. at 1484 (emphasis added). The court concluded, "an arbitrator's compensation and expenses must be paid by the employer alone." Id. at 1481.

----------Footnotes----------

n1 Judge Henderson dissented from this holding, challenging the majority's reading of the applicable rules and arguing that the agreement to arbitrate should be enforced "without judicial reformation." *Cole, 105 F.3d at 1490-91.*

----------End Footnotes----------

- [**11]

The Cole court defined the compensation and expenses for which the employee had no obligation to pay to include the arbitrator's honorarium, the arbitrator's expenses, and any other costs associated with the arbitrator's services. Id. at 1484 n.15. Those were the employer's responsibility. The court distinguished arbitrator's fees from other fees, such as filing fees, expenses, or administrative fees, all of which employees could be required to pay. Id. at 1481, 1483-4.

Plaintiff argues that Cole requires that the arbitrators' award, which assessed plaintiff $ 6,365 in fees, should be vacated. However, this case is different from Cole in one important respect: plaintiff's Statement of Claim did not include any statutory claim, which was the heart of the complaint in Cole. In reaching its decision that the arbitration

agreement could be interpreted to require the employer to pay all of the arbitrator's fees and expenses, the Cole court focused on the fact that the plaintiff had raised statutory claims: "Thus, in *Gilmer*, the Supreme Court endorsed a system of arbitration in which ***employees are not required to pay for the arbitrator assigned to hear*** [**12] ***their statutory claims***. There is no reason to think that the Court would have approved arbitration in the absence of this arrangement. Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case." *Cole, 105 F.3d at 1484* (emphasis added) (citing *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991))*. The Cole court found it was "unacceptable" for an employee to pay arbitrators' fees when pursuing his or her statutory claims, because "such fees are unlike anything [the employee] would have [*5] to pay to pursue his ***statutory claims*** in court." Id. (emphasis added). Thus, the Cole holding does not control here, because the plaintiff did not raise statutory claims in his Statement of Claim. Instead, based on the Form U-4 signed by the parties, the NASD rules on fees govern. See Dkt. 28, Ex. 1, p. 4, P 5.

The relevant NASD rules give arbitrators discretion in assessing the amount of and who pays certain fees. National Association of Securities Dealers [**13] Code of Arbitration (visited May 2, 2000) <http://www.nasdr.com/2820b.htm#10205>. Arbitrators determine who pays forum fees, adjournment fees, costs for pre-hearing proceedings, and other miscellaneous fees. Id. (Rule 10205(c)). Pursuant to Rule 10205(c), the arbitration panel in this case assessed plaintiff with half of the costs relating to the March 22, 1999, adjournment requested by both parties, as well as an initial

filing fee, forum fees, and administrative costs. Dkt. 14, Addendum.

A review of the administrative record, the Cole decision, and the applicable NASD rules establishes that the arbitration panel acted within the scope of its authority in dismissing plaintiff's Statement of Claim with prejudice and in assessing plaintiff with $ 6,365 in fees. The panel did not "exceed their powers" within the meaning of *9 U.S.C. § 10*(a)(4) by refusing to stay the arbitration proceeding based on plaintiff's challenge to the assessment of fees. Plaintiff challenged the arbitrators' decision based on the erroneous assumption that Cole ousted the arbitrators' authority because they had assessed him $ 750 as his share of the adjournment fees. If the [**14] result of plaintiff's challenge was an ex parte arbitration, that is no fault of the arbitrators. Plaintiff left them no reasonable alternative, as he absented himself from the arbitration hearing and precluded his counsel from making a defense on the merits.

If an arbitration award cannot be vacated pursuant to *9 U.S.C. § 10* or modified pursuant to *9 U.S.C. § 11*, the award must be confirmed. *9 U.S.C. § 9; Denver and Rio Grande Western Railroad Company v. Union Pacific Railroad Company, 868 F. Supp. 1244, 1252 (D. Kan. 1994)* (citing *Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698, 707-08 (2d Cir. 1985))*. A review of the criteria for vacation under § 10 and for modification under § 11 establishes that there is no reason to vacate or modify the November 9, 1999, award. Accordingly, an accompanying order grants defendants' cross-motion to confirm that award.

III.

Defendants Wheat First, First Union, and Wishnack also move to dismiss or, in the alternative, to compel plaintiff to

arbitrate the federal statutory claims asserted in the first amended complaint.

Count One of that complaint [**15] alleges that defendants "conspired by threat and intimidation to delay, hinder and prevent the proper execution of the laws of the United States... by harassing, terminating, and blacklisting [plaintiff] upon learning that [plaintiff] had 'blown the whistle' on the illegal practices of Wheat First...." Compl. 56. In Counts Two and Three, plaintiff alleges that defendants "conspired to deny employment to [plaintiff]" by contacting two potential employers regarding plaintiff's contacts with the Securities and Exchange Commission. Compl. 64, 73. Plaintiff maintains that these actions by defendants constitute violations of the uncodified portion of Section 2 of the Civil Rights Act of 1871, which states in relevant part: "if two or more persons...shall conspire together...by force, intimidation, or threat to prevent, hinder, or delay the execution of any law of the United States, ... each and every person so offending shall be deemed guilty of a high crime." 17 Stat. 13 (April 20, 1871), Section 2, Cl. 2.

At the April 5, 2000, motions hearing, plaintiff argued that, although the "prevent, hinder or delay" clause of Section 2 is [*6] not codified, it creates an actionable claim. Plaintiff [**16] cites no cases, and concedes none exist, recognizing a claim under this uncodified portion of Section 2. See Dkt. 33.

Even if plaintiff established that a cause of action exists under the uncodified portion of Section 2, plaintiff must arbitrate those claims. The Federal Arbitration Act states, in relevant part: "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or

transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *9 U.S.C. § 2.* The Act authorizes judicial enforcement of arbitration agreements where a party has failed, neglected, or refused to arbitrate. *9 U.S.C. § 4; Perry v. Thomas, 482 U.S. 483, 485n.1, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987).* The Act establishes "a federal policy favoring arbitration," *Shearson/American Express v. McMahon, 482 U.S. 220, 226, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987)* (citing *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)),* [**17] and the Act requires a district court to direct parties to proceed to arbitration on issues with respect to which they have signed an arbitration agreement. *Dean Witter Reynolds, Inc., v. Byrd, 470 U.S. 213, 218, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985).* An agreement to arbitrate survives the termination of employment and covers the arbitration of wrongful termination claims, as well as claims for post-termination tortious conduct. See *Zandford v. Prudential-Bache Sec., Inc., 112 F.3d 723 (4th Cir. 1997).*

When defendant Wheat First hired plaintiff in 1991, he registered with the NASD. Dkt. 28, Ex. 1. As noted, in his registration application (Form U-4), plaintiff subscribed to a provision in which he agreed to arbitrate any claim required to be arbitrated by the NASD Code of Arbitration Procedure. Id. at p. 4, P 5. In addition, plaintiff and defendant signed a Uniform Submission Agreement, submitting plaintiff's claims to arbitration under the same rules. Dkt. 28, Ex. 3. NASD Rule 10201(a) specifically mandates the arbitration of claims arising out of the termination of employment of a registered representative, with the exception of employment [**18] discrimination claims. n2 Dkt. 28, Ex. 4.

----------Footnotes----------

n2 Rule 10201(b) states that a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated, but may if the parties agree to arbitrate it. Dkt. 28, Ex. 4.

----------End Footnotes----------

Plaintiff argues that his claims under Section 2 of the Civil Rights Act of 1871 are employment discrimination claims, and that, based on NASD Rule 10201(b), he is not required to arbitrate them. However, Counts One, Two, and Three are more akin to obstruction of justice claims. As noted, plaintiff brings his statutory claims under the "prevent, hinder, or delay the execution of any law of the United States" clause in Section 2 of the Civil Rights Act of 1871. This uncodified provision is similar to the codified portion of Section 2, entitled "Obstructing justice," which creates a cause of action prohibiting conspiracy to obstruct justice by intimidating parties, witness, or jurors in federal court proceedings. See *42 U.S.C. § 1985* [**19] (2) (prohibiting "two or more persons" from conspiring "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court..."); see also *Britt v. Suckle, 453 F. Supp. 987, 990-91 (E.D. Tex. 1978)* (holding that plaintiffs stated a cause of action under *42 U.S.C. § 1985*(2) for conspiracy to obstruct the due course of justice where plaintiffs alleged that defendants, *inter alia*, conspired to prevent their employees from seeking vindication of their legal right to recover for injuries caused by defendant's negligence). Thus, even if

plaintiff states a claim under the uncodified portion of Section 2, it is for [*7] obstruction of justice, not employment discrimination.

The Supreme Court has ruled that statutory claims may be "the subject of an arbitration agreement, enforceable pursuant to the [Federal Arbitration Act]." *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991).* In addition, Cole supports the arbitration of statutory claims as long as an employee is not required to pay for an arbitrator's fees and expenses. It [**20] is undisputed that plaintiff entered into an agreement to arbitrate any claim required to be arbitrated under the NASD rules. Dkt. 28, Ex. 3. Because the NASD rules require arbitration of claims arising out of the termination of employment, and because plaintiff's novel statutory claims are not strictly employment discrimination claims, plaintiff must arbitrate Counts One, Two, and Three in his complaint. As a result, defendants' motion to compel arbitration shall be granted. In conducting the arbitration of plaintiff's statutory claims, the panel selected should heed the teaching of Cole that, in this Circuit, the obligation to compensate arbitrators for their services and reimburse their expenses falls entirely upon the employer. See supra pp. 6-7.

Because defendants' motion to confirm the arbitration award, which dismissed with prejudice plaintiff's common law claims, shall be granted and a judgment entered, and because defendants' motion to compel arbitration of plaintiff's statutory claims shall be granted, plaintiff's amended complaint is now moot; an accompanying order dismisses it.

Date: June 13, 2000

Louis F. Oberdorfer

UNITED STATES DISTRICT JUDGE

ORDER [**21]

There are three pending motions in this matter. Defendants' Wheat First, First Union Corporation, and Marshall Wishnack move to compel arbitration, or in the alternative, to dismiss plaintiff's first amended complaint (Dkt. 28). Defendants' Wheat First and First Union move to confirm arbitration award (Dkt. 29). Plaintiff moves to vacate arbitration award (Dkt. 26). For the reasons stated in the accompanying Memorandum, it is this 13th day of June 2000, hereby

ORDERED: that plaintiff's motion to vacate arbitration award is DENIED, and it is further

ORDERED: that defendants' cross-motion to confirm arbitration award is GRANTED, so that it is further

ORDERED: that JUDGMENT is entered pursuant to the November 9, 1999, award of the panel of National Association of Securities Dealers, Inc., arbitrators, and it is further

ORDERED: that defendants' motion to compel arbitration of plaintiff's statutory claims (Counts 1-3) is GRANTED, and it is further

ORDERED: that the new arbitration panel shall assess arbitrator's fees and expenses consistent with *Cole v. Burns International Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465 (D.C. Cir. 1997)*, and the accompanying [**22] Memorandum, and it is further

ORDERED: that plaintiff's amended complaint is DISMISSED as moot.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Award

NASD Regulation, Inc.

In the Matter of the Arbitration Between

Name of Claimant

Ronald L. Brown

VS. **Case No. 9800653**

Name of Respondent

Wheat First Securities, Inc.

REPRESENTATION OF PARTIES

Claimant, Ronald L. Brown, hereinafter referred to as "Claimant": Michael D. Kohn, Esq. and David Colapinto, Esq., Kohn, Kohn & Colapinto, Washington, D.C.

Respondent, Wheat First Securities, Inc., hereinafter referred to as "Respondent": Stephen G. Topetzes, Esq. and Michael T. Missal, Esq., Kirkpatrick & Lockhart, Washington, D.C.

CASE INFORMATION

Statement of Claim filed on or about: February 18, 1998
Claimant signed the Uniform Submission Agreement: February 11, 1998
Statement of Answer filed by Respondent on or about: June 10, 1998
Respondent signed the Uniform Submission Agreement: June 29, 1998

CASE SUMMARY

Claimant asserted the following causes of action: wrongful termination, breach of implied contract, defamation, slander, and tortious interference with Claimant's business relationships. These allegations relate to Claimant's employment with Respondent in the Washington, D.C. location.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted the following defenses: failure to state a claim upon which relief can be granted; claims barred, in whole or in part, by the doctrine of waiver and estopped; statements made on a regulatory reports including the Form U-5 have qualified immunity and that Claimant suffered no damages that resulted from any action by Respondent.

RELIEF REQUESTED

Claimant requested:

Compensatory Damages	$15,000,000.00
Punitive Damages	
Attorneys' Fees	
Other Costs	

Respondent requested:

Attorneys' Fees & Costs

Non-Monetary Relief if any:

Denial of all claims

Referral of Claimant for disciplinary action

OTHER ISSUES CONSIDERED AND DECIDED

At the commencement of the hearing on the merits, Michael D. Kohn, Esq. and David Colapinto, Esq. made a special appearance solely for the purpose of giving notice to the panel that Claimant canceled the arbitration contract and would not be proceeding on the merits. Claimant did not appear.

The panel considered Respondent's Motion to Dismiss With Prejudice, and award Respondent costs and attorneys' fees in the amount of $239,970.00. The panel further considered

post-hearing submissions from the parties on the Motion, and after due deliberation, granted the Motion to Dismiss With Prejudice. However, there was no contractual or statutory basis for an award of attorneys' fee, and although the panel considered awarding attorneys' fees to Respondent as a sanction, felt that it would not be appropriate to do so.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings and argument presented at the hearing, and the post-hearing submissions, the Panel decided in full and final resolution of the issues submitted for determination as follows:

1. That the Statement of Claim is dismissed with prejudice; and
2. That each party shall bear their own costs and expenses, with the exception of the forum fees as specified below; and
3. That any and all relief not specifically addressed herein, including punitive damages, is denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees:

NASD Regulation, Inc. will retain or collect the non-refundable filing fees for each claim:

Initial claim filing fee	= $ 500.00

Member Fees:

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. In this matter, the member firm is a party.

Member surcharge	= $3,600.00
Pre-hearing process fee	= $ 600.00
Hearing process fee	= $5,000.00

Adjournment Fees:

Adjournments requested during these proceedings:

Joint Request for Adjournment of March 22-26, 1999 hearing dates

Forum Fees and Assessments:

The Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrators, including a pre-hearing conference

with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

2 Pre-hearing sessions with a single arbitrator x $300.00 = $6OO.00

Pre-hearing conferences:

February 11, 1999 1 session

April 13, 1999 1 session

2 Pre-hearing sessions with Panel x $1,500.00 = $3,000.00

Pre-hearing conferences:

September 15, 1998 1 session

March 16, 1999 1 session

1 Hearing sessions x $1,500.00 = $1,500.00

Hearing Date: September 13, 1999 1 session

Total Forum Fees = $5,1O0.O0

The Panel assessed the forum fees to Claimant.

Administrative Costs

Administrative costs are expenses incurred due to a request by a party for special services including, but not limited to, additional copies of arbitrator awards beyond those provided

without charge, copies of audio transcripts, retrieval of documents from archives, interpreters, and security.

Claimant's administrative costs	= $ 15.00
Respondent's administrative costs	= $ 35.00

Fee Summary

Claimant be and hereby is solely liable for:

Initial Filing Fee	= $ 500.00
Adjournment Fee	= $ 750.00
Forum Fees	= $5,1OO.O0
Administrative Costs	= $ 15.00
Total Fees	= $6,365.00
Less payments	= $2,000.00
Balance Due NASD Regulation, Inc.	= $4,365.00

Respondent be and hereby is solely liable for:

Member Fees	= $9,200.00
Adjournment Fee	= $ 750.00
Administrative Costs	= $ 35.00
Total Fees	= $9,985.00
Less payments	= $9.970.00
Balance Due NASD Regulation, Inc.	= $ 15.00

All balances are due and payable to NASD Regulation, Inc.

Concurring Arbitrators

Maurice R. Dunie, Esq. Signature Date: November 6, 1999
Arbitrator, Presiding Chair

James P. O'Donnell Signature Date: November 7, 1999
Public Arbitrator

Wendie L. Wachtel Signature Date: November 5, 1999.
Industry Arbitrator

Date of Service: November 9, 1999

NASD

Code of Arbitration Procedure

10310. Notice of Selection of Arbitrators (a) The Director shall inform the parties of the arbitrators' names and employment histories for the past 10 years, as well as information disclosed pursuant to Rule 10312, at least 15 business days prior to the date fixed for the first hearing session. A party may make further inquiry of the Director concerning an arbitrator's background. In the event that, prior to the first hearing session, any arbitrator should become disqualified, resign, die, refuse or otherwise be unable to perform as an arbitrator, the Director shall appoint a replacement arbitrator to fill the vacancy on the panel. The Director shall inform the parties as soon as possible of the name and employment history of the replacement arbitrator for the past 10 years, as well as information disclosed pursuant to Rule 10312. A party may make further inquiry of the Director concerning the replacement arbitrator's background and within the time remaining prior to the first hearing session or the 10 day period provided under Rule 10311, whichever is shorter, may exercise its right to challenge the replacement arbitrator as provided in Rule 10311.

(b) This Rule shall not apply to arbitration proceedings that

are subject to Rule 10308.

[Amended eff. Sept. 19, 1988; May 10, 1989; amended by SR-NASD-97-34 eff. Aug. 6, 1997; amended by SR-NASD-98-48 eff. Nov. 17, 1998.]

10311. Peremptory Challenge (a) In an arbitration proceeding, except as provided in Rule 10335, each party shall have the right to one peremptory challenge. In arbitrations where there are multiple Claimants, Respondents, and/or Third-Party Respondents, the Claimants shall have one peremptory challenge, the Respondents shall have one peremptory challenge, and the Third-Party Respondents shall have one peremptory challenge. The Director may in the interests of justice award additional peremptory challenges to any party to an arbitration proceeding. Unless extended by the Director, a party wishing to exercise a peremptory challenge must do so by notifying the Director in writing within 10 business days of notification of the identity of the person(s) named under Rule 10310 or Rule 10321(d) or (e), whichever comes first. There shall be unlimited challenges for cause.

(b) This Rule shall not apply to arbitration proceedings that are subject to Rule 10308.

[Amended eff. Oct. 1, 1984; amended by SR-NASD-91-49 eff. Jan. 2, 1992; amended by SR-NASD-93-38 eff. Jan. 3,

1996; amended by SR-NASD-97-34 eff. Aug. 6, 1997; amended by SR-NASD-98-48 eff. Nov. 17, 1998.]

10312. Disclosures Required of Arbitrators and Director's Authority to Disqualify (a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose: (1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators should disclose any such relationships or circumstances that they have with any party or its counsel, or with any individual whom they have been told will be a witness. They should also disclose any such relationship or circumstances involving members of their families or their current employers, partners, or business associates.

(b) Persons who are requested to accept appointment as arbitrators should make a reasonable effort to inform themselves of any interests, relationships or circumstances described in paragraph (a) above.

(c) The obligation to disclose interests, relationships, or

circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(d) Removal by Director

(1) The Director may remove an arbitrator based on information that is required to be disclosed pursuant to this Rule.

(2) After the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, the Director may remove an arbitrator based only on information not known to the parties when the arbitrator was selected. The Director's authority under this subparagraph (2) may be exercised only by the Director or the President of NASD Dispute Resolution.

(e) The Director shall inform the parties to an arbitration proceeding of any information disclosed to the Director under this Rule unless either the arbitrator who disclosed the information withdraws voluntarily as soon as the arbitrator learns of any interest, relationship, or circumstances described in paragraph (a) that might preclude the arbitrator from rendering an objective and impartial determination in the

proceeding, or the Director removes the arbitrator.

[Amended eff. May 10, 1989; amended by SR-NASD-98-48 eff. Nov. 17, 1998; amended by SR-NASD-00-34 eff. Mar. 8, 2001. Selected Notice to Members: 01-13]

10313. Disqualification or Other Disability of Arbitrators

In the event that any arbitrator, after the commencement of the earlier of (a) the first pre-hearing conference or (b) the first hearing but prior to the rendition of the award, should become disqualified, resign, die, refuse or otherwise be unable to perform as an arbitrator, the remaining arbitrator(s) shall continue with the hearing and determination of the controversy, unless such continuation is objected to by any party within 5 days of notification of the vacancy on the panel. Upon objection, the Director shall appoint a replacement arbitrator to fill the vacancy and the hearing shall continue. The Director shall inform the parties as soon as possible of the name and employment history of the replacement arbitrator for the past 10 years, as well as information disclosed pursuant to Rule 10312. A party may make further inquiry of the Director concerning the replacement arbitrator's background. If the arbitration proceeding is subject to Rule 10308, the party may exercise his or her right to challenge the replacement arbitrator within the time remaining prior to the next scheduled hearing session by notifying the Director in writing of the name of the

arbitrator challenged and the basis for such challenge. If the arbitration proceeding is not subject to Rule 10308, within the time remaining prior to the next scheduled hearing session or the 10 day period provided under Rule 10311, whichever is shorter, a party may exercise the party's right to challenge the replacement arbitrator as provided in Rule 10311.

[Amended eff. Sept. 19, 1988; amended by SR-NASD-97-34 eff. Aug. 6, 1997; amended by SR-NASD-98-48 eff. Nov. 17, 1998.]

Arbitrator Disclosure Checklist

The Arbitrator Disclosure Checklist is sent to the arbitrators as part of the Oath of Arbitrator. It not only provides a reminder to the arbitrators to consider all possible disclosures, but also requires a complete explanation of any possible conflict with the parties.

Please indicate your response to each of the questions listed below by checking the appropriate box. *Please check "yes" or "no" to each question*. Provide a **full explanation** to any question(s) to which you provided a "yes" response. All affirmative responses and explanations will be sent to the parties.

Question	Yes	No
1. Do you presently represent any person in a proceeding adverse to any party to the arbitration?	[ ]	[ ]
2. Have you represented any other person against any party to the arbitration in the past five years?	[ ]	[ ]
3. Have you been retained to assist any party as an expert or otherwise in a proceeding involving any party to the arbitration in the last five years?	[ ]	[ ]
4. Have you had any professional or social relationships with counsel for any party in this proceeding or the firm for which they work?	[ ]	[ ]
5. Have you had any professional or social relationships with any party in this proceeding or the firm for which they work?	[ ]	[ ]
6. Have you had any professional or social relationships with any relative of any party, counsel, or identified witness in this proceeding?	[ ]	[ ]
7. Have you ever served as an arbitrator in a proceeding in which any of the identified witnesses		

or named parties gave testimony?	[ ]	[ ]
8. Have you or any member of your family maintained an account individually, jointly, or beneficially with a brokerage firm named in this proceeding?	[ ]	[ ]
9. Have you ever, as a party to an arbitration or litigation, named a broker-age firm, or been named by a brokerage firm, in any civil lawsuit or arbitration proceeding?	[ ]	[ ]
10. Have you ever been named as a party by an investor in any civil lawsuit or arbitration proceeding?	[ ]	[ ]
11. Are you a member of any securities-related organization (e.g., Securities Industry Association) or organization of claimants or attorneys who periodically represent investors in suits against brokerage firms (e.g., Public Investors Arbitration Bar Association)?	[ ]	[ ]
12. Have any of your relatives named a brokerage firm, or been named by a brokerage firm, in any civil lawsuit or arbitration	[ ]	[ ]
13. Have you or a member of your immediate family invested in or held any of the securities that are the subject of this dispute during the time periods in question?	[ ]	[ ]

Question	**Yes**	**No**
14. Have you, any member of your immediate family, close social or business associate, been involved in the last five years in a dispute involving the same subject matter as contained in the case to which you are assigned?	[ ]	[ ]

15. Has any member of your immediate family or household been employed by a brokerage firm? [ ] [ ]

16. Have you had any social or professional relationship with any other arbitrator assigned to this case? [ ] [ ]

17. Has your conduct been an issue in an arbitration or litigation proceeding (other than a proceeding in which you served as an arbitrator)? For example, if your conduct as a registered representative or manager was an issue in a case, but only the broker/dealer was named as a party, your response should be "yes." [ ] [ ]

18. Do you have any disclosures on your record in the Central Registration Depository (CRD) system that are not reflected on your disclosure report? [ ] [ ]

Explain and clarify any "yes" answers to the above questions. If needed, attach additional sheet(s).

Arbitrator Disqualification Criteria

The Arbitrator Disqualification Criteria is also sent to the arbitrators as part of the Oath of Arbitrator. It must be reviewed by the arbitrators to confirm whether they meet any of the criteria for disqualification. An arbitrator subject to disqualification cannot act as an arbitrator on any case.

Criteria For Temporary Disqualification—Temporary Disqualification will result in temporary declination as to new applicants and a status of "inactive" as to already enrolled arbitrators.

Pending actions	Arbitrator is the subject of, or is a party to, a pendinginvestment-related civil action or arbitration claim initiated by a customer; or, civil action or administrative complaint initiated by a regulatory body; or, a civil action or regulatory complaint alleging discrimination or sexual harassment. This provision excludes cases where the arbitrator's conduct in his or her role as an arbitrator is at issue.
Subject of claims or complaints	Arbitrator is the subject of, or is a party to, three (3) or more claims or complaints (reportable on Form U-4) within the last ten (10) years regardless of outcome.
Filed a statement of claim	Arbitrator is a party (excluding

or complaint	representatives and unnamed parties to class actions) that has filed two or more investment-related civil actions or arbitration claims within the last ten (10) years.
Final decisions, awards	Arbitrator is the subject of, or is a party to, a final, adverse investment-related court decision or arbitration award of $25,000 or more within the past seven (7) years resulting from a customer-initiated complaint or claim.
Decisions, awards involving discrimination/sexual harassment	Arbitrator is the subject of, or is a party to, final, adverse court decision or arbitration award of $25,000 or more involving any discrimination claims including sexual harassment issued within the last seven (7) years. Arbitrator is the subject of, or is a party to, a final, adverse regulatory decision involving any discrimination claims, including sexual harassment, issued within the past seven (7) years.

Final regulatory action Arbitrator is the subject of, or is a party to, any final adverse decision issued by any regulatory authority within the past seven (7) years, where the adverse decision does not involve a technical violation or does not give rise to a statutory disqualification.

Director of Arbitration's judgment	The Director of Arbitration may temporarily remove an

arbitrator, if, in his or her sole judgment, it is determined that the arbitrator is not otherwise properly included in the list of eligible neutrals.

Criteria For Permanent Disqualification—Permanent Disqualification means the application of any new applicant will be rejected and enrolled neutrals will be removed from the roster without possibility of reconsideration.

Misstatement/omission	Misstatement or failure to disclose material information in the arbitrator profile.
Disciplinary actions	Final, adverse disciplinary action by any domestic or foreign regulatory or governing professional body on a finding of, including but not limited to, false statement or omissions, material violation of investment-related regulation, or the violation of a non-technical rule of such organizations or statute.
Misdemeanors	Misdemeanor involving investments, investment-related activities.
Felonies	Felony conviction or plea of guilty or nolo contendere (no contest) to a felony charge.
Fraud	Final adverse court decisions where there has been a finding of fraud.

Statutory disqualifications	Statutory disqualifications not included above.
Director of Arbitration's judgment	The Director of Arbitration, upon the approval of the National Arbitration & Mediation Committee, may remove an arbitrator if in his or her judgment the arbitrator is not otherwise properly included in the list of eligible neutrals.

December 23, 1998

Via Facsimile and First Class Mail

Lynn M. Fraser, Esq.
National Association of Securities Dealers, Inc.
1753 K Street, N.W.
Washington, D.C. 20006

Re: NASD Arbitration No. 98-00653; Brown vs. Wheat First Securities, Inc.

Dear Ms. Fraser:

I write you about an apparent conflict of interest concerning panelist Wendie L. Wachtel. I recently learned that Mr. Ronald Brown's former counsel, Reinhardt & Anderson, wrote Mr. Brown on December 9 1998, stating that a potential conflict of interest was disclosed by Ms. Wachtel and that Reinhardt & Anderson made an oral request for her removal which they believed had been granted by NSDA. A redacted copy of Reinhardt & Anderson's December 9 letter is appended hereto for your review (in a follow-up phone conversation Reinhardt & Anderson advised me that the panelist referenced in the December 9, 1998 letter is that of Ms. Wachtel). Of course, neither I nor Mr. Brown have knowledge of these facts and can only go on what

Reinhardt & Anderson reports.

The statements contained in Reinhardt & Anderson's December 9, 1998 letter demonstrate to Claimant that Ms. Wachtel should be disqualified from this matter. As such, pursuant to Code of Arbitration Procedure Rules 10311 and 10312, counsel to Claimant requests the removal of Ms. Wachtel for cause.

Please let me know if I additional information is needed. I look forward to hearing from the Director of Arbitration as soon as possible.

Very truly yours,

Michael D. Kohn

cc: Stephen G. Topetzes, Esq. (Via fist class mail)

NASD Notice to Members 01-04 January 2001

NASD Notice to Members 01-04

Rules For Arbitrator Challenges

SEC Approves Amendments To Director's Authority To Remove Arbitrators For Cause; **Effective Date: February 12, 2001**

* * *

Executive Summary

On December 8, 2000, the Securities and Exchange Commission (SEC) approved amendments to National Association of Securities Dealers, Inc. (NASD) Rules 10308 and 10312 to provide authority for the Director of Arbitration (Director) to remove arbitrators for cause after hearings have begun. The Code of Arbitration Procedure (Code) presently provides that the authority of the Director to remove an arbitrator for cause ceases after the earlier of the first pre-hearing conference or the first hearing. The amendments eliminate this restriction, and allow the Director or the President of NASD Dispute Resolution, Inc. (NASD Dispute Resolution) non-delegable authority to remove an arbitrator for cause at any time and, if the challenge is raised after the initial pre-hearing or hearing session, to require that it be based on information not known to the parties when the arbitrator was appointed.

* * *

Discussion

Background

In order to protect the integrity of the arbitration process and to ensure the impartiality of arbitrators, Rule 10312(a) requires that arbitrators make full disclosure of certain

enumerated interests, relationships, and circumstances, as well as "any circumstances which might preclude such arbitrator from rendering an objective and impartial determination." Under the current list selection method for choosing arbitrators, Rule 10308(b)(6) requires the Director to send the parties the employment history and other background information about the arbitrators on their lists. The parties may request additional information. Then, as provided in Rule 10308(c), they may strike any number of arbitrators from the list for any reason, and rank those who remain. The Director or his staff consolidates the parties' lists in ranking order and, if the number of arbitrators available to serve from the consolidated list is not sufficient to fill a panel, the Director uses the Neutral List Selection System (NLSS) to extend the list and appoints one or more additional arbitrators to complete the panel. Parties receive information about any arbitrators appointed by extending the list, and have the right to raise for-cause challenges as provided in Rule 10308(d)(1). Rule 10308(c)(4)(A) provides that the Director appoints arbitrators "subject to availability and disqualification." "Availability" refers to the arbitrator's ability to serve on the case in the desired location during the relevant time period. "Disqualification" could occur either (i) when a disqualifying fact is revealed to the Director after the parties have completed the striking and ranking process, or (ii) when the Director consults with a ranked arbitrator candidate just prior to appointment

and the candidate, upon hearing more case-specific information, reveals information that the Director determines is a basis for disqualification. In the latter case, the Director would either drop the arbitrator, or disclose the information to the parties and invite their views on whether the arbitrator should serve.

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Under Rule 10312(c), an arbitrator's disclosure obligation continues throughout the arbitration. If a disqualifying fact comes to light after a panel has been appointed, Rules 10308(d) and 10312(d) permit the Director to remove an arbitrator based on such information before the earlier of the first pre-hearing conference or the first hearing. Once one of these events occurs, Rules 10308(d)(2) and 10312(f) currently state that the Director's authority to remove an arbitrator ceases. Nevertheless, current Rule 10312(f) requires the Director to inform the parties of any potentially disqualifying information disclosed after the first pre-hearing or hearing session. At that point, however, a party can no longer use a challenge for cause to remove the arbitrator. Therefore, when a for-cause objection is raised after the first pre-hearing or hearing session, the arbitrator can only be removed where he or she agrees to step down or all the parties agree that the arbitrator should be removed. Failing that, an aggrieved party's only recourse is to seek judicial intervention, which increases the party's legal expenses, causes delays, and reduces confidence in

the fairness and efficiency of the arbitration process. NASD Dispute Resolution believes that an alternative dispute resolution forum should be able to resolve all issues relating to an arbitration without forcing the parties to go to court. Accordingly, NASD Dispute Resolution has amended the Code to permit the Director to remove an arbitrator for cause at any time and, if the challenge is raised after the initial pre-hearing or hearing session, to require that it be based on information not known to the parties when the arbitrator was appointed. In addition, certain minor language changes have been made to clarify that both relationships and circumstances must be disclosed if they fit within the criteria of Rule 10312, and that the Rule is not limited to personal relationships and circumstances of the arbitrator, as described in more detail below. Some users of the arbitration forum may be concerned about the ability of the staff to remove arbitrators who were selected by the parties, based on one party's objection. To address that concern, the amend-ments provide that the only persons who can remove arbitrators after the first pre-hearing or hearing session are the Director and the President of NASD Dispute Resolution. This authority cannot be delegated. In addition, as discussed above, removal after the first pre-hearing or hearing session can only be based on information: (1) that was required to be disclosed pursuant to Rule 10312; and (2) that was not known to the parties at the time the arbitrator was appointed.

Description Of Amendments

NASD Dispute Resolution has amended Rule 10308, the list selection rule, to provide that the authority of the Director to disqualify or remove arbitrators does not end when the first pre-hearing or hearing session begins. Rather, amended 10308(d)(2) provides that, after that first session, the Director may remove an arbitrator from an arbitration panel based on information that is required to be disclosed pursuant to Rule 10312 and that was not previously disclosed. Rule 10312, the arbitrator disclosure rule, has been amended in several places. Rule 10312(a)(2) has been amended to include disclosure of existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. The word "personally" has been deleted from the second sentence of Rule 10312(a)(2), as it might be read too narrowly, and the phrase "or circumstances" has been added to paragraphs (b) and (e) of Rule10312. This clarifies that the arbitrator is required to disclose *any* relationships or circumstances that might fit under Rule 10312. NASD Dispute Resolution also has amended Rule 10312 to pro-vide, as in Rule 10308, that the Director's authority to remove arbitrators does not cease with the first pre-hearing or hearing session. There are two restrictions on the exercise of this authority, however, once such sessions have begun. Amended Rule 10312(d)(2) provides that, after the earlier of the first pre-hearing conference or the first hearing, the

Director may remove an arbitrator based only on information not known to the parties when the arbitrator was selected. This provision is intend-ed to prevent parties from raising challenges late in the process that could have been raised at the outset. Amended Rule 10312(d)(2) also provides that the Director's authority under this subparagraph may only be exercised by the Director or by the President of NASD Dispute Resolution.

Rule 10312(e) has been amended to be consistent with the above changes, and Rule 10312(f) is deleted as no longer necessary in light of the preceding changes.

Effective Date

The amended rule will apply to arbitrators appointed on or after February 12, 2001.

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Endnotes

1 Exchange Act Release No. 43695 (Dec. 8, 2000) (File No. SR-NASD-00-34), 65 Federal Register 78520 (Dec. 15, 2000).

2 The standard for circumstances that would be considered "for cause" would be the same as the general disclosure standard contained in Rule 10312: "any circumstances which might preclude such arbitrator from rendering an objective and impartial determination."

3 Rules 10103 provides that the duties and functions of the Director may be delegated, as appropriate (but see revised Rule10312(d)(2), contained in the Attachment, which prohibits delegation in certain circumstances).

NASD Regulation, Inc.
Office of Dispute Resolution
Satellite Office
1735 K Street, N.W.
4th Floor
Washington, DC 20006-1506

December 28, 1998

Michael D. Kohn, Esq.
Kohn, Kohn & Colapinto, P.C.
3233 P Street, N.W.
Washington, DC 20007

Subject: NASD Arbitration Number 98-00653
Ronald L. Brown vs. Wheat First Securities, Inc.

Dear Mr. Kohn:

Pursuant to your request as to information about a disclosure made by Arbitrator Wendie Wachtel, Arbitrator Wendie L. Wachtel disclosed during the Initial Prehearing Conference that:

1. A partner at Kirkpatrick & Lockhart has a discretionary account with Wachtel & Co., Inc. Arbitrator Wachtel is the account executive for this account. Contact with this customer is infrequent because it is a discretionary account.

2. More than 10 years ago, Wachtel & Co., Inc. acted as investment banker for corporate issuers using Kirkpatrick & Lockhart as SEC counsel.

The arbitrator affirmatively states that the foregoing facts will not affect her ability to be fair and impartial in the decision of this matter. In the interest of full disclosure, the arbitrator wished to inform the parties of these facts.

There is no reference in the file as to any oral challenge for cause made by Claimant's previous counsel based on this disclosure, but a challenge must always be made in writing. A challenge will be granted if it is reasonable to infer an absence of impartiality, the presence of bias or the existence of some interest on the part of the arbitrator in the outcome of the arbitration as it affects one of the parties. The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative.

Very truly yours,
Lynn M. Fraser
Staff Attorney
DC/202-728-8177

Supreme Court, U.S.
FILED
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(2)

No. 01-611

IN THE

Supreme Court of the United States

RONALD L. BROWN,

Petitioner,

v.

WHEAT FIRST SECURITIES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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November 2001

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QUESTIONS PRESENTED

At the first conference of the arbitrators and counsel for the parties, one arbitrator of a panel of three disclosed a tangential relationship to a lawyer in the law firm representing the Respondents. This disclosure was made after the period had expired for peremptory challenges to the arbitrator, but more than a year before the hearing. Ultimately, the arbitrators made an award in favor of the Respondents. The Petitioner sought to vacate the award on the ground of bias of the arbitrator.

1. Did the court of appeals err in refusing to vacate the award for the reason that the Petitioner failed to request an extension of time to make a peremptory strike of the arbitrator?

2. Did the court of appeals err in refusing to vacate the award for the reason that Petitioner failed to allege in the court of appeals that the connection with the law firm disclosed by the arbitrator would justify removal for cause?

STATEMENT PURSUANT TO RULE 29.6

First Union Corporation acquired Wheat First Securities, Inc. ("Wheat First") in January 1998. Wheat First is now operating under the name First Union Securities, Inc., a broker-dealer registered with the United States Securities and Exchange Commission.

First Union Securities, Inc. is a wholly owned subsidiary of Wachovia Corporation.

Wachovia Corporation is a publicly held interstate financial holding company, the shares of which are traded on the New York Stock Exchange under the symbol "WB." The corporation's subsidiaries provide banking and other financial services to individuals and institutions.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Contrary to Petitioner's argument, this case raises no question about the legal test for determining whether an arbitration award should be vacated on the basis of "evident partiality" of one of the arbitrators. In this case, the United States Court of Appeals for the District of Columbia Circuit articulated no such standard whatsoever. Instead, it ruled that Petitioner had not requested an extension of time to make a peremptory strike against an arbitrator, nor had Petitioner made any argument in the court of appeals justifying removal of the arbitrator for cause. Pet. App. 10.[1] For these reasons, the court of appeals rejected his claim that he was denied his right to exercise his peremptory strikes. Accordingly, this case presents no issue concerning whether a disclosure by an arbitrator of a relationship to one of the parties, made after the expiration of the period for peremptory challenges, is covered by this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), nor does it bear on the supposed conflicts among the courts of appeals on the standard for vacating an arbitration award where there has been no such disclosure by the arbitrator.

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[1] "Pet. ___" refers to pages of the Petition For Writ Of Certiorari. "Pet. App. ___" refers to pages of the Appendix attached to the Petition For Writ Of Certiorari. "D.C. Cir. Jt. App. ___" refers to pages of the Joint Appendix filed in the United States Court of Appeals for the D.C. Circuit. Citations to documents not contained in the above appendices state the formal title of the document.

STATEMENT OF THE CASE

1. Background

Respondent Wheat First Securities, Inc. ("Wheat First") is a regional, full service securities broker-dealer that is registered with the United States Securities and Exchange Commission ("SEC") and that is a member of the National Association of Securities Dealers, Inc. ("NASD"). Wheat First hired Petitioner Ronald L. Brown in November 1991 to work as a registered representative in its Washington, D.C. branch office. Pet. App. at 2. Upon joining Wheat First, Mr. Brown completed a standard registration form prescribed by securities regulators, called the Uniform Application for Securities Industry Registration or Transfer ("Form U-4"), which includes a pre-dispute arbitration clause. Pet. App. at 14-15.

Mr. Brown continued to work at Wheat First for over five years, until February 1997, when his employment was terminated.[2] Pet. App. at 2. On February 18, 1998, pursuant to his Form U-4 arbitration agreement, Mr. Brown instituted an arbitration proceeding by filing a Statement of Claim with the NASD's Office of Dispute Resolution against Wheat First alleging wrongful termination, breach of implied contract, defamation, slander and tortious interference. Pet. App. at 29. At that time, Mr. Brown also signed and presented to the NASD a Uniform Submission Agreement, in which he agreed to arbitrate his claims under NASD rules. Pet. App. at 3. He sought $25,000,000 in compensatory and punitive damages. Pet. App. at 3. In support of his wrongful termination claim,

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[2] *That same day*, Mr. Brown started a new position as a salesman at another Washington, D.C. area brokerage firm, where he remained for over two years. "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 8-10.

Mr. Brown alleged that Wheat First fired him for alerting the SEC to supposed illegal activities at Wheat First in 1996.[3] *Id.*

In July of 1998, a panel of three arbitrators was appointed under the NASD Code of Arbitration Procedure. One of the arbitrators assigned to hear Mr. Brown's claims was Wendie L. Wachtel. Pet. App. at 35. She is a principal of Wachtel & Co., Inc., a registered broker-dealer in the District of Columbia. Pet. App. at 10, 57.

At or about the time the NASD notified the parties that it had selected the members of the arbitration panel, the NASD distributed arbitrator disclosure forms to the parties in accordance with Rule 10312 of the NASD Code of Arbitration Procedure. Specifically, Rule 10312(a) requires each arbitrator "to disclose to the Director of Arbitration any circumstance which might preclude such arbitrator from rendering an objective and impartial determination [including any] existing or past financial, business . . . relationships or circumstances that are likely to affect impartiality or might reasonably create

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[3] The SEC conducted a surprise examination of Wheat First's Washington, D.C. branch office in December 1996, but took no action pursuant to this examination. Concerned about this perceived inaction by the SEC, Mr. Brown sent letters to U.S. Congressman Frank Wolf, the U.S. Department of Justice, the SEC's Philadelphia District Office and SEC Commissioner Laura Unger in which he accused various high-level SEC officials, including SEC Chairman Arthur Levitt, of corruption and incompetence with respect to the investigation of Wheat First. At the same time that he was sending these letters, Mr. Brown repeatedly refused to cooperate with the SEC voluntarily and even pursuant to subpoena. The United States District Court for the Eastern District of Pennsylvania eventually ordered him to comply with the subpoena under penalty of contempt. Mr. Brown and his then attorney also refused to cooperate with an investigation initiated by the Inspector General of the Federal Deposit Insurance Corporation into his allegations against high-level SEC officials, forcing it to close its investigation. "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 8-10.

The SEC has not instituted any action or proceeding against Wheat First related to Mr. Brown's alleged complaints.

an appearance of partiality or bias . . . with any party or its counsel . . . ." Pet. App. at 38. Subsection (c) of this Rule makes this disclosure duty continuing in the event that the appointed arbitrators later recall or discover circumstances requiring disclosure. Pet. App. at 38-39. Rule 10311 also provides that each party has ten days from the date on which the NASD makes the arbitrators' names and disclosure forms available to make a peremptory challenge to remove an arbitrator, unless that time is extended by the Director of Arbitration. Pet. App. at 36. Neither Mr. Brown nor Wheat First made any peremptory challenges during the course of the proceedings, Pet. App. at 10, nor did Mr. Brown ever request the Director of Arbitration to extend the time for him to make a challenge. *Id.*

At the first scheduling conference among the arbitrators and the parties' counsel on September 15, 1998, Ms. Wachtel disclosed the following: she is the account executive of a discretionary brokerage account of an individual partner of Kirkpatrick & Lockhart LLP, counsel for Wheat First, and more than ten years before the arbitration her firm acted as an investment banker for corporate issuers using Kirkpatrick & Lockhart (or a predecessor law firm) as securities counsel.[4] Pet. App. at 9-10, 57. At that time, Ms. Wachtel stated to the parties that the foregoing facts would not affect her ability to be fair and impartial. Pet. App. at 9-10, 57-58.

This disclosure was made months before the final hearing and more than a year before the arbitration award was issued. At the time of the disclosure, Mr. Brown's former

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[4] The relationship between Kirkpatrick & Lockhart LLP, a national law firm with over 650 attorneys in ten offices around the country, and Ms. Wachtel or her firm was characterized by the D.C. Circuit as "tangential." Pet. App. at 9. The Kirkpatrick & Lockhart partner whose account was handled by Ms. Wachtel has never played any role in any aspect of this case. Similarly, no lawyer who represented Ms. Wachtel's firm on investment banking matters more than ten years earlier at Kirkpatrick & Lockhart or a predecessor law firm was involved in any aspect of this case.

counsel could have, but did not, request that the NASD Director of Arbitration extend the time for him to assert a peremptory challenge to Ms. Wachtel. Pet. App. at 9-10. Nor did Mr. Brown's current counsel, retained in December 1998, ever request such an extension. *Id.* The letter from Mr. Brown's current counsel to the NASD, cited in his Petition (Pet. at 6), "requests the removal of Ms. Wachtel *for cause.*" Pet. at 6-7; D.C. Cir. Jt. App. at JA 0208 (emphasis added). The NASD staff attorney noted in her response to Mr. Brown's counsel that the NASD had *never* received any oral or written challenge to Ms. Wachtel from Mr. Brown's counsel prior to the December 1998 letter requesting her removal for cause. Pet. App. at 57-58. That letter also stated that Ms. Wachtel represented to the parties that her relations with a lawyer in the firm representing Wheat First would not affect her ability to be fair and impartial. Pet. App. at 58. The NASD rejected Mr. Brown's request for removal of Ms. Wachtel for cause. Pet. App. at 10.

When Mr. Brown engaged new counsel in December 1998, both parties jointly requested a postponement of the hearing, then scheduled for March of 1999. Pet. App. at 3. The panel of arbitrators agreed to the postponement and rescheduled the hearing to September 13-17, 1999. *Id.* Pursuant to Arbitration Rule 10319, the arbitrators assessed a $1,500 postponement fee in equal parts - $750 to each party. *Id.*

Mr. Brown's counsel promptly and repeatedly objected to the payment of his share of the postponement fee and any other forum fee, relying on *Cole v. Burns Int'l Sec. Services*, 105 F.3d 1465 (D.C. Cir. 1997). Pet. App. at 3. That case held that arbitration forum fees could not be charged to an employee required to arbitrate federal statutory rights. Pet. App. at 2. Mr. Brown's counsel asserted that the *Cole* holding should apply to the nonstatutory claims he asserted in the arbitration. The arbitrators repeatedly rejected his *Cole* position.

Mr. Brown took the position that the NASD had lost jurisdiction of the proceeding and could no longer render any judgment on the merits. Pet. App. at 17. On September 12, 1999, the Sunday evening before the Monday morning hearing, Mr. Brown sent a submission to the panel in which he stated that he unilaterally "cancelled" his arbitration agreement. Pet. App. at 3.

The next morning, Wheat First's lawyers appeared before the panel of arbitrators with its witnesses and documents, prepared to commence the arbitration proceeding. Pet. App. at 3. Mr. Brown willfully failed to appear without notice to counsel for Wheat First. Pet. App. at 3. Mr. Brown's lawyers were present, not formally on his behalf, but as self-described "concerned members of the public" and attempted to submit to the panel for consideration the "cancellation" notice they had served the night before. Pet. App. at 3. After reviewing this notice, the arbitrators determined that the hearing should proceed as scheduled according to the NASD Code of Arbitration Procedure. Pet. App. at 4, 17. About two months later, on November 9, 1999, the arbitration panel rendered an award, dismissing Mr. Brown's claims with prejudice. Pet. App. at 4.

2. Procedural History of This Litigation

On June 30, 1999, while the arbitration proceeding was still pending and more than two months prior to the scheduled arbitration hearing on September 13, 1999, Mr. Brown filed a complaint in the United States District Court for the District of Columbia. Pet. App. at 4, 12. The claims alleged in the complaint were virtually identical to those he asserted in arbitration. Pet. App. at 17. He demanded $25,000,000 in compensatory and punitive damages, as he had in his arbitration proceeding. "Memorandum of Points and Authorities in Support of Motion To Compel Arbitration, or in the Alternative, To Dismiss the First Amended Complaint for Failure To State a Claim" in the court of appeals at 2. After the arbitration award was handed down, he filed an amended complaint on December 13, 1999. Pet. App. at 17.

Subsequently, on February 29, 2000, Mr. Brown moved to vacate the arbitration award. Pet. App. at 4; "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 2. On March 10, 2000, Wheat First moved to dismiss Mr. Brown's amended complaint and, on March 27, 2000, it cross-moved to confirm the award. Pet. App. at 4; "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 2.

On June 13, 2000, the district court ruled on all the pending motions, denying Mr. Brown's motion to vacate the arbitration award; granting Wheat First's motion to confirm the arbitration award, entering judgment on the award, and dismissing Mr. Brown's common law claims with prejudice; compelling the arbitration of newly-raised claims in Mr. Brown's amended complaint on the basis of a Wheat First motion filed prior to the arbitration award; and dismissing as moot Mr. Brown's amended complaint. Pet. App. at 12-27.

Mr. Brown filed a Notice of Appeal on July 11, 2000, and Wheat First filed a Notice of Cross-Appeal on July 25, 2000. Pet. App. at 4; "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 11. The United States Court of Appeals for the District of Columbia Circuit consolidated the appeals on August 14, 2000. "Answering Brief of Defendants-Appellees and Opening Brief of Cross-Appellants" in the court of appeals at 11. On July 31, 2001, the D.C. Circuit affirmed the district court's order confirming the arbitration award, and vacated and remanded the order compelling arbitration of the newly raised claims in the amended complaint with instructions to dismiss the complaint. Pet. App. at 1-11.

Mr. Brown's argument under *Cole* was the centerpiece of his case before the arbitrators and on judicial review. Pet. App. at 7, 19-21. Both the district court and the court of appeals affirmed the arbitrators' rejection of *Cole*. The D.C. Circuit held, on a number of grounds, that the arbitrators had

not lost jurisdiction, "the simplest of which is that Brown's was a *losing Cole* claim." Pet. App. at 9. Mr. Brown does not seek review in this Court of the *Cole* issue.

The district court did not reach the alleged bias issue. With respect to the bias issue, the court of appeals made three major points. First, unlike the present case where the disclosure was made early in the proceeding, the cases cited by Mr. Brown "all involved revelations made after the *award* had been made and are therefore inapplicable here. See, e.g., *Commonwealth Coatings* . . . ." Pet. App. at 10. Second, "Brown fails to show that he requested an extension of the time available to use his peremptory strikes." *Id.* Third, Mr. Brown "requested only removal *for cause*. The NASD rejected this request, and Brown fails to even allege here that the connections disclosed would justify removal for cause." *Id.*

Mr. Brown did not seek rehearing in the court of appeals.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S ARGUMENT REGARDING *COMMONWEALTH COATINGS* IS IRRELEVANT BECAUSE THE D.C. CIRCUIT NEVER CONSIDERED THE "EVIDENT PARTIALITY" STANDARD.

Petitioner is incorrect in his assertion that the D.C. Circuit refused to apply this Court's *Commonwealth Coatings* holding – a decision which interprets "evident partiality" under § 10(b) of the Federal Arbitration Act ("FAA") for vacatur of arbitration awards (9 U.S.C. § 10(b)) – and instead articulated its own "for cause" standard for vacatur of arbitration awards in conflict with other circuits' interpretations. Pet. at 10, 16. The D.C. Circuit never interpreted the FAA's "evident partiality" standard. The court

of appeals ruled that Mr. Brown's motion to vacate failed because he did not request an extension of time to use a peremptory strike and did not support in the court of appeals his motion to remove Ms. Wachtel for cause. Pet. App. at 9-10.

The Rules of the NASD Code of Arbitration Procedure in effect at the time Mr. Brown's arbitration was pending are set forth at Pet. App. 36-41. The Code provides two options to parties seeking to eliminate arbitrators from arbitration panels: (1) the right to one peremptory challenge to be exercised within ten days of notification of the identity of the persons named to the arbitration panel, unless that ten day period is "extended by the Director [of Arbitration]"; and (2) unlimited challenges "for cause" throughout the course of the proceeding. Pet. App. at 37 (Rule 10311(a)).

Mr. Brown never asked the Director of Arbitration to extend the time for him to make his peremptory strike. Pet. App. at 10. In the court of appeals, Mr. Brown argued that the Director should have removed Ms. Wachtel on his own initiative "in the interest of justice."[5] Mr. Brown did make a motion to remove Ms. Wachtel for cause, which was denied, Ms. Wachtel representing that she would be fair and impartial. Pet. App. at 10. But on appeal, Mr. Brown never

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[5] "Brief on Behalf of Mr. Brown Answering Cross-Appellant's Opening Brief and Replying to Appellee's Answering Brief" in the court of appeals at 25. In his court of appeals brief, Mr. Brown cited to Rule 10308(d)(2) of the NASD Code of Arbitration Procedure, which permits the Director of Arbitration to remove an arbitrator based on information that was required to be, but was not, previously disclosed. *Id.* Mr. Brown argued: "This rule contains no requirement that a party move for the Director to remove the tainted arbitrator . . . it merely states that the Director may do so." *Id.* at 25-26. The court of appeals resolved this issue against Mr. Brown. Pet. App. at 10.

argued that the relationship Ms. Wachtel disclosed amounted to disqualification for cause.[6]

Mr. Brown's failure to do so prompted the court of appeals to state, "Brown fails to even allege here that the connections disclosed would justify removal for cause." Pet. App. at 10. The Petition to this Court quotes only the latter portion of this statement, omitting "Brown fails to even allege here," and distorting its meaning. The Petition states merely, "Brown failed to allege 'that the connections disclosed would justify removal for cause.' " Pet. at 16. Of course, the D.C. Circuit did not hold that Mr. Brown had to meet the "traditional *for cause* standard" as the Petition there claims, *id.*; it merely held that Mr. Brown never made any argument before it to support his motion to disqualify Ms. Wachtel for cause. Pet. App. at 10.

Because the D.C. Circuit in this case never ruled on the legal test to be applied in determining whether an arbitration award should be vacated for potential or actual bias, the Petition's entire argument premised on that assumption is irrelevant. The decision of the D.C. Circuit in this case does not conflict with *Commonwealth Coatings* or with any of the other cases cited in the Petition. That stated basis of conflict for seeking review in this Court is not supported.

Moreover, *Commonwealth Coatings*, and virtually all of the other decisions relied upon in the Petition are inapplicable as the D.C. Circuit observed in the proceedings below, because they "involved revelations made after the *award* had been made . . . ." Pet. App. at 10. While Mr. Brown asserts that this is "a distinction without meaning," Pet. at 12, the *Kiernan* decision cited in the Petition illustrates that the distinction is with meaning. *Id.* at 12-13. In that case, where the disclosure was made, as here, pre-award, the United States

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[6] See "Appellant's Brief" in the court of appeals at 35-40, and "Brief on Behalf of Mr. Brown Answering Cross-Appellant's Opening Brief and Replying to Appellee's Answering Brief" in the court of appeals at 24-27.

Court of Appeals for the Eighth Circuit refused to vacate the award because the party had not made timely and appropriate objections.[7] It is obvious that when the disclosure is made for the first time after an award has been issued, the objecting party could not have protected himself during the course of the proceeding through appropriate motions or objections. To permit a party to obtain vacatur of an arbitration award based on information he possessed prior to the award, when he did not take appropriate action on that information during the proceeding, would allow the party to wait and see how the proceeding comes out.

II. ANY BIAS BY MS. WACHTEL COULD NOT HAVE AFFECTED THE ARBITRATION AWARD.

Mr. Brown essentially defaulted by electing not to participate in the arbitration hearing. His reliance on *Cole* for this strategy did not prevail, and the arbitrators' ruling was affirmed by the district court and the court of appeals. Justice Black's observation in *Commonwealth Coatings*, quoted in the Petition (Pet. at 9 (quoting 343 U.S. at 149)), that arbitrators "have completely free rein to decide the law as well as the facts and are not subject to appellate review," does not fit here, where the claimant absented himself from the arbitration proceeding and the arbitrators' ruling on the law was upheld by two courts.

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[7] *Kiernan v. Piper Jaffray Co., Inc.*, 137 F.3d 588 (8th Cir. 1998).

CONCLUSION

The Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

RONALD L. BROWN,

Petitioner,

v.

WHEAT FIRST SECURITIES, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

On October 9, 2001 Ronald L. Brown filed a petition for *certiorari* in the case of *Brown v. Wheat First Securities, Inc.*, 257 F.3d 821 (D.C. Cir. 2001). On November 13, 2001 Mr. Brown received a copy of respondent Wheat First's Brief in Opposition to this petition. In accordance with Supreme Court Rule 15(6), Mr. Brown hereby files his reply brief.

I. Wheat First Misstates the Controlling NASD Procedures.

It is undisputed that arbitrator Wendie Wachtel sat in judgment of the claims Mr. Brown filed before the National Association for Securities Dealers, Inc. ("NASD"), and that she failed to timely disclose "existing or past financial, business ...relationships or circumstances" she had with the Defendant in that arbitration proceeding. Brief in Opposition, pp. 3-4. It is also undisputed that Mr. Brown had only ten days from the date he received Ms. Wachtel's mandatory disclosure statement to exercise a peremptory challenge. *Id.* It is also undisputed that Ms. Wachtel waited until after the commencement of the first pre-hearing conference before disclosing her relationship with the Respondent. *Id.*, p. 4. The parties do not agree, however, whether there was a procedure available to Mr. Brown to correct Ms. Wachtel's failure to properly disclose her existing or past financial dealings with Wheat First.

Wheat First claims (as did the Court of Appeals) that Mr. Brown could have filed a motion with the NASD Director of Arbitration seeking additional time in which to raise a peremptory challenge. If true, Wheat First asserts, this case would not present a *Commonwealth Coatings* issue because the offending taint could have been corrected by Mr. Brown.

This procedural argument is without merit. Indeed, the NASD procedural rules applicable at the time of the Brown arbitration did not contemplate or permit extending the time period to file peremptory challenges. This fact is conceded by

NASD itself. NASD's interpretation of its arbitration rules demonstrates that this case presents an important issue of procedural fairness falling within the penumbra of *Commonwealth Coatings*, 393 U.S. 145 (1968).

On September 22, 2000, after the Brown arbitration panel had dismissed Mr. Brown's claims, the Securities and Exchange Commission published a NASD notice of proposed rule-making in the *Federal Register*. Securities and Exchange Commission, *Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealer, Inc. Relating to the Authority of the Director of Arbitration to Remove Arbitrators for Cause*, 65 *Federal Register* 57413 (September 22, 2000). The proposed rule change addressed the issue confronted by Mr. Brown in this proceeding, *i.e.*, what NASD was permitted to do under its own rules to correct problems arising from untimely disclosures of potential conflicts of interest.

In the rulemaking notice, NASD admitted that if a "disqualifying fact" came to light "before" the first "prehearing conference" the Director of Arbitration had the authority to remove a potentially tainted arbitrator. However, once a pre-hearing conference commenced the "Director's authority to remove an arbitrator ceases." 65 *Federal Register* at 57414.[1/]

This is precisely what occurred in the Brown proceeding. The disqualifying facts were disclosed during the first pre-hearing conference, after the authority of the Director to take any action to remove the tainted arbitrator had terminated. Thus, Mr. Brown was not able to petition to the

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[1/] The NASD rule in effect at the time of the Brown hearing states: "After the commencement of the . . . first pre-hearing conference . . . the Director's authority to remove an arbitrator from an arbitration panel ceases." NASD Rule 10312(f) (1998). This rule was subsequently changed in response to the NASD rulemaking. The change was effective on March 8, 2001, long after the Brown arbitration.

Director of Arbitration to increase the amount of time to file a peremptory challenge.

As NASD explained in their rulemaking:

> At this point [i.e. after the commencement of the first pre-hearing conference], however, a party can no longer use a challenge for cause to remove the arbitrator. Rather, the parties can only attempt to resolve the matter themselves, which can be difficult in the adversarial setting . . . if the parties do not agree, a party objecting to the continued service of the arbitrator may make a formal request for the arbitrator to recuse himself or herself; however, the arbitrator may decline the request.

65 *Federal Register* at 57414.

As NASD observed, a litigant's only recourse to challenge the continued participation of the arbitrator was through "judicial intervention." *Id.* NASD recognized that such judicial intervention would be predicated on *Commonwealth Coatings* related concerns, i.e., an issue regarding the "an arbitrator's failure to disclose a business relationship with one of the parties." *Id.*, n. 7.

Mr. Brown found himself in the precise predicament discussed in the NASD rulemaking. The arbitrator rejected a "for cause" issue raised by Mr. Brown and, when asked to leave the panel, refused to recuse herself. As recognized in the rulemaking, Mr. Brown was left with no option other then to seek judicial relief, which he did.

The Court of Appeals improperly rejected Mr. Brown's *Commonwealth Coatings* issues. The Court faulted Mr. Brown for not demonstrating that the arbitrator should have been rejected in accordance with the very high "for cause" standard. Mr. Brown correctly argued that under *Commonwealth Coatings*, the "for cause" standard is not the standard to be

applied where an arbitrator failed to make a mandatory disclosure of a potential conflict of interest.

Certiorari should be granted in this case, in order to clearly reject the "for cause" analysis presented by the lower court, and to resolve the split in the Circuit Courts as to whether the majority holding or the concurring opinion sets forth the proper standard for reviewing whether an arbitration award must be set aside when an arbitrator fails to make a timely disclosure of potential conflicts of interest.

II. The Bias of the Arbitrator Did Affect the Arbitration Award.

Wheat First seeks to downplay the prejudice caused by the tainted arbitrator's participation by asserting that Mr. Brown lost the arbitration proceeding by default. This argument is without merit because the tainted arbitrator participated in a number of pre-hearing decisions which led to Mr. Brown's decision to essentially boycott the proceeding. For example, the arbitrator participated in the panel which voted to charge Mr. Brown very high fees to continue with the proceeding, she voted on the panel which refused to stay the arbitration proceeding pending the district court proceedings, she voted on the panel which decided to reject Mr. Brown's motion for a dismissal without prejudice and she voted with the panel which decided to conduct the arbitration hearing after Mr. Brown objected to the proceeding going forward. In fact, instead of permitting Mr. Brown to withdraw his claim without prejudice, the tainted arbitrator voted with the panel and decided to issue a final ruling on the merits of Mr. Brown's complaint - a ruling with *res judicata* and *collateral estoppel* effect, and which subsequently resulted in the dismissal of a Civil Rights Act claim which was not even presented to the arbitrators. App. 10-11.

The procedures used by NASD in the Brown arbitration were flawed and in direct conflict with *Commonwealth Coatings*. The tainted arbitrator improperly failed to disclose potential conflicts of interest, as mandated by NASD rules. Mr.

Brown, unaware of any potential conflict, did not have the opportunity to meaningfully exercise his peremptory strikes. Thus, the tainted arbitrator was permitted to sit on the arbitration panel, and Mr. Brown had no procedural right to remove the tainted arbitration panel member.

Once Mr. Brown learned of the arbitrator's failure to make the mandatory disclosure, he promptly sought to have her removed from the panel. However, under the rules in place, Mr. Brown and NASD's Director of Arbitration were powerless to remove the arbitrator.

CONCLUSION

For the reasons set forth in Mr. Brown's Petition for Writ of Certiorari, and the forgoing reply brief, this Court should grant Mr. Ronald L. Brown's Petition. Wheat First could have avoided a *Commonwealth Coatings* problem by consenting to the withdrawal of the tainted arbitrator. Wheat First chose to ignore *Commonwealth Coatings*, and urged the lower courts to misconstrue that holding in a manner inconsistent with the prior holdings of this Court, other courts and the public interest.

Respectfully submitted,

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